



State of New Jersey
GOVERNMENT RECORDS COUNCIL
101 SOUTH BROAD STREET
PO BOX 819
TRENTON, NJ 08625-0819

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

LORI GRIFA
Commissioner

FINAL DECISION

November 30, 2010 Government Records Council Meeting

Howard Kupferman
Complainant

Complaint No. 2007-213

v.

Long Hill Township Board of Education (Morris)
Custodian of Record

At the November 30, 2010 public meeting, the Government Records Council (“Council”) considered the November 23, 2010 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 this complaint be dismissed because the Complainant’s Counsel voluntarily withdrew this complaint from the Office of Administrative Law in a letter to the Honorable Barry E. Moscowitz dated September 22, 2010. Therefore, no further adjudication is required.

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 30th Day of November, 2010

Robin Berg Tabakin, Chair
Government Records Council

I attest the foregoing is a true and accurate record of the Government Records Council.

Charles A. Richman, Secretary
Government Records Council

Decision Distribution Date: December 3, 2010



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
November 30, 2010 Council Meeting**

**Howard Kupferman¹
Complainant**

GRC Complaint No. 2007-213

v.

**Long Hill Township Board of Education
(Morris)²
Custodian of Records**

Records Relevant to Complaint:

June 5, 2007 OPRA request:

Any and all invoices and payment vouchers for legal services regarding any litigation by the Complainant.

June 18, 2007 OPRA request:

Letter of resignation from Mr. Art DiBenedetto (“Mr. DiBenedetto”) to Ms. Suzanne Becker (“Ms. Becker”), Board of Education President, and the Custodian dated June 14, 2007.

July 7, 2007 OPRA request:

Records obtained from legal counsel and all notes made during the conversation with counsel on the following dates:

1. February 21, 2007.
2. February 26, 2007.
3. February 28, 2007.
4. March 15, 2007.
5. March 15, 2007.
6. March 30, 2007.

July 16, 2007 OPRA request:

Executive session meeting minutes for the June 11, 2007 Board of Education (“BOE”) meeting.

August 17, 2007 OPRA request:

1. Invoices included in the “Bills List” for August 1, 2007 to be approved per Resolution 5 of the August 20, 2007 Agenda.
2. Invoices included in the “Bills List” for August 20, 2007 to be approved per Resolution 5 of the August 20, 2007 Agenda.³

¹ Represented by Walter M. Luers, Esq., Law Offices of Walter Luers, LLC (Oxford, NJ).

² No legal representation listed on record.

³ Additional records were requested which are not relevant to this complaint.

Request Made: June 5, 2007; June 18, 2007; July 7, 2007; July 16, 2007; August 17, 2007

Response Made: June 5, 2007; June 25, 2007; July 17, 2007; July 24, 2007; August 20, 2007

Custodian: John Esposito

GRC Complaint Filed: September 17, 2007⁴

Background

December 16, 2009

Government Records Council's ("Council") Interim Order. At its December 16, 2009 public meeting, the Council considered the December 9, 2009 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. Because the Custodian provided the resignation letter of Mr. DiBenedetto dated June 14, 2007 omitting the second (2nd) redaction to the Complainant as required by the Council's Interim Order, and because the Custodian provided certified confirmation of compliance pursuant to N.J. Court Rule 1:4-4 to the Executive Director within five (5) business days of receiving the Council's Interim Order, the Custodian has complied with the Council's November 4, 2009 Interim Order.
2. Although the Custodian unlawfully denied access to the information contained within the second (2nd) redaction of the resignation letter of Mr. DiBenedetto and the first (1st) 02/21/07 NC entry on page 1 of the attorney invoices, because the Custodian complied with the Council's Interim Orders dated August 11, 2009 and November 4, 2009, it is concluded that 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. However, the Custodian's unlawful "deemed" denial of access appears negligent and heedless since he is vested with the legal responsibility of granting and denying access in accordance with the law.
3. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." *Id.* at 432. Additionally, pursuant to Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6, Teeters v. DYFS, 387 N.J. Super. 423 (App.

⁴ The GRC received the Denial of Access Complaint on said date.

Div. 2006), and Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Thus, this complaint should be referred to the Office of Administrative Law for the determination of reasonable prevailing party attorney's fees.

December 29, 2009

Council's Interim Order distributed to the parties.

December 30, 2009

Complaint transmitted to the Office of Administrative Law ("OAL").

September 22, 2010

Letter from the Complainant's Counsel to the Honorable Barry E. Moscovitz. Counsel withdraws this complaint from consideration.

Analysis

No analysis required.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that this complaint be dismissed because the Complainant's Counsel voluntarily withdrew this complaint from the Office of Administrative Law in a letter to the Honorable Barry E. Moscovitz dated September 22, 2010. Therefore, no further adjudication is required.

Prepared By: Frank F. Caruso
Senior Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

November 23, 2010



State of New Jersey
GOVERNMENT RECORDS COUNCIL
101 SOUTH BROAD STREET
PO BOX 819
TRENTON, NJ 08625-0819

JON S. CORZINE
Governor

CHARLES A. RICHMAN
Acting Commissioner

INTERIM ORDER

December 22, 2009 Government Records Council Meeting

Howard Kupferman
Complainant

Complaint No. 2007-213

v.

Long Hill Township Board of Education (Morris)
Custodian of Record

At the December 22, 2009 public meeting, the Government Records Council (“Council”) considered the December 9, 2009 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. Because the Custodian provided the resignation letter of Mr. DiBenedetto dated June 14, 2007 omitting the second (2nd) redaction to the Complainant as required by the Council’s Interim Order, and because the Custodian provided certified confirmation of compliance pursuant to N.J. Court Rule 1:4-4 to the Executive Director within five (5) business days of receiving the Council’s Interim Order, the Custodian has complied with the Council’s November 4, 2009 Interim Order.
2. Although the Custodian unlawfully denied access to the information contained within the second (2nd) redaction of the resignation letter of Mr. DiBenedetto and the first (1st) 02/21/07 NC entry on page 1 of the attorney invoices, because the Custodian complied with the Council’s Interim Orders dated August 11, 2009 and November 4, 2009, it is concluded that 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. However, the Custodian’s unlawful “deemed” denial of access appears negligent and heedless since he is vested with the legal responsibility of granting and denying access in accordance with the law.
3. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the Complainant has achieved “the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian’s conduct.” *Id.* at 432. Additionally, pursuant to Mason v. City of Hoboken



and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6, Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), and Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Thus, this complaint should be referred to the Office of Administrative Law for the determination of reasonable prevailing party attorney's fees.

Interim Order Rendered by the
Government Records Council
On The 22nd Day of December, 2009

Robin Berg Tabakin, Chair
Government Records Council

I attest the foregoing is a true and accurate record of the Government Records Council.

Harlynn A. Lack, Secretary
Government Records Council

Decision Distribution Date: December 29, 2009

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
December 22, 2009 Council Meeting**

**Howard Kupferman¹
Complainant**

GRC Complaint No. 2007-213

v.

**Long Hill Township Board of Education
(Morris)²
Custodian of Records**

Records Relevant to Complaint:

June 5, 2007 OPRA request:

Any and all invoices and payment vouchers for legal services regarding any litigation by the Complainant.

June 18, 2007 OPRA request:

Letter of resignation from Mr. Art DiBenedetto (“Mr. DiBenedetto”) to Ms. Suzanne Becker (“Ms. Becker”), Board of Education President, and the Custodian dated June 14, 2007.

July 7, 2007 OPRA request:

Records obtained from legal counsel and all notes made during the conversation with counsel on the following dates:

1. February 21, 2007.
2. February 26, 2007.
3. February 28, 2007.
4. March 15, 2007.
5. March 15, 2007.
6. March 30, 2007.

July 16, 2007 OPRA request:

Executive session meeting minutes for the June 11, 2007 Board of Education (“BOE”) meeting.

August 17, 2007 OPRA request:

1. Invoices included in the “Bills List” for August 1, 2007 to be approved per Resolution 5 of the August 20, 2007 Agenda.
2. Invoices included in the “Bills List” for August 20, 2007 to be approved per Resolution 5 of the August 20, 2007 Agenda.³

¹ Represented by Walter M. Luers, Esq., Law Offices of Walter Luers, LLC (Oxford, NJ).

² No legal representation listed on record.

³ Additional records were requested which are not relevant to this complaint.

Request Made: June 5, 2007; June 18, 2007; July 7, 2007; July 16, 2007; August 17, 2007

Response Made: June 5, 2007; June 25, 2007; July 17, 2007; July 24, 2007; August 20, 2007

Custodian: John Esposito

GRC Complaint Filed: September 17, 2007⁴

Background

November 4, 2009

Government Records Council's ("Council") Interim Order. At its November 4, 2009 public meeting, the Council considered the October 21, 2009 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 has complied with the Council's August 11, 2009 Interim Order by providing the Council with all records set forth in said Order within five (5) business days of receiving the Council's Order.
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 table⁵ within five (5) business days from receipt of this Order and simultaneously provide certified confirmation of compliance, pursuant to N.J. Court Rules, 1969 R. 1:4-4 (2005), to the Executive Director.**
3. The Custodian unlawfully denied access to the second (2nd) redaction made to the resignation letter of Mr. DiBenedetto because that information is not specifically exempted from access under OPRA as the date and reason for separation of employment of an employee is disclosable pursuant to N.J.S.A. 47:1A-10. Therefore, the Custodian must disclose the redacted information to the Complainant. Additionally, the Custodian unlawfully denied access to the redaction of the amount of time ("0.75 Hrs") on the first (1st) 02/21/07 NC entry on page 1 of the attorney invoices. Because the GRC has revealed the missing information as part of these findings, no further disclosure is required.

November 6, 2009

Council's Interim Order distributed to the parties.

⁴ The GRC received the Denial of Access Complaint on said date.

⁵ The GRC ordered the Custodian to disclose the information contained within the second (2nd) redaction of the resignation letter of Mr. DiBenedetto dated June 14, 2007.

November 16, 2009

Custodian's response to the Council's Interim Order.⁶ The Custodian certifies that the second (2nd) redaction of the resignation letter of Mr. DiBenedetto dated June 14, 2007 has been removed and the letter provided to the Complainant pursuant to the Council's November 4, 2009 Interim Order.

The Custodian states that he will send a hard copy of said certification to the Complainant via U.S. mail because the Complainant's e-mail address is no longer valid. The Custodian states that he has also copied the Complainant's Counsel on the instant e-mail and will forward the certification to the Complainant if provided with a working e-mail address.⁷

Analysis

Whether the Custodian complied with the Council's November 4, 2009 Interim Order?

The Council's November 4, 2009 Interim Order specifically directed the Custodian to disclose the information contained within the second (2nd) redaction of the resignation letter of Mr. DiBenedetto dated June 14, 2007. Said Order also directed the Custodian to provide certified confirmation of compliance to the GRC's Executive Director within five (5) business days from receipt of said Order.

The Custodian simultaneously provided legal certification of his compliance with the Council's Interim Order to the GRC and the Complainant's Counsel on November 16, 2009, or the fifth (5th) business day following receipt of the said Order.

Therefore, because the Custodian provided the resignation letter of Mr. DiBenedetto dated June 14, 2007 omitting the second (2nd) redaction to the Complainant as required by the Council's Interim Order, and because the Custodian provided certified confirmation of compliance pursuant to N.J. Court Rule 1:4-4 to the Executive Director within five (5) business days of receiving the Council's Interim Order, the Custodian has complied with the Council's November 4, 2009 Interim Order.⁸

Whether the Custodian's unlawful denial of access to the redacted information rises to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances?

⁶ The Custodian provided a copy of the certification with the attached letter via e-mail to the Complainant's Counsel and acknowledged that the Complainant's e-mail address is no longer valid.

⁷ The Custodian initially provided a certification to the GRC on disclosing that the second (2nd) redaction made to the resignation letter of Mr. DiBenedetto was "...curriculum and instruction portion of administrative..." The GRC subsequently contacted the Custodian via telephone and advised that the Council's Interim Order required disclosure of the letter without the second (2nd) redaction.

⁸ In the November 4, 2009 Interim Order, the GRC only ordered disclosure of one (1) redaction in the resignation letter of Mr. DiBenedetto and noted that since the information in the first (1st) redaction of the March 15, 2007 invoice had been revealed, there was no need for disclosure.

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:

“... If 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 (Berg); 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 the information contained within the second (2nd) redaction of the resignation letter of Mr. DiBenedetto and the first (1st) 02/21/07 NC entry on page 1 of the attorney invoices, because the Custodian complied with the Council’s Interim Orders dated August 11, 2009 and November 4, 2009, it is concluded that 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. However, the Custodian’s unlawful “deemed” denial of access appears negligent and heedless since he is vested with the legal responsibility of granting and denying access in accordance with the law.

Whether the Complainant is a “prevailing party” pursuant to N.J.S.A. 47:1A-6 and entitled to reasonable attorney’s fees?

OPRA provides that:

“[a] person who is denied access to a government record by the custodian of the record, at the option of the requestor, may:

- institute a proceeding to challenge the custodian's decision by filing an action in Superior Court...; or
- in lieu of filing an action in Superior Court, file a complaint with the Government Records Council...

A requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee.” N.J.S.A. 47:1A-6.

In Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the court held that a complainant is a “prevailing party” if he/she achieves the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian’s conduct. *Id.* at 432. Additionally, the court held that attorney’s fees may be awarded when the requestor is successful (or partially successful) via a judicial decree, a quasi-judicial determination, or a settlement of the parties that indicates access was improperly denied and the requested records are disclosed. *Id.*

In Teeters, the complainant appealed from a final decision of the Government Records Council which denied an award for attorney's fees incurred in seeking access to certain public records via two complaints she filed under the Open Public Records Act (OPRA), N.J.S.A. 47:1A-6 and N.J.S.A. 47:1A-7.f., against the Division of Youth and Family Services (“DYFS”). The records sought involved an adoption agency having falsely advertised that it was licensed in New Jersey. DYFS eventually determined that the adoption agency violated the licensing rules and reported the results of its investigation to the complainant. The complainant received the records she requested upon entering into a settlement with DYFS. The court found that the complainant engaged in reasonable efforts to pursue her access rights to the records in question and sought attorney assistance only after her self-filed complaints and personal efforts were unavailing. *Id.* at 432. With that assistance, she achieved a favorable result that reflected an alteration of position and behavior on DYFS’s part. *Id.* As a result, the complainant was a prevailing party entitled to an award of a reasonable attorney's fee. Accordingly, the Court remanded the determination of reasonable attorney’s fees to the GRC for adjudication.

Additionally, the New Jersey Supreme Court has ruled on the issue of “prevailing party” attorney’s fees. In Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), the court discussed the catalyst theory, “which posits that a plaintiff is a ‘prevailing party’ if it achieves the desired result because the lawsuit brought about a voluntary change in the defendant’s conduct.” Mason, *supra*, at 71, (quoting Buckhannon Board & Care Home v. West Virginia Department of Health & Human Resources, 532 U.S. 598, 131 S. Ct. 1835, 149 L. Ed. 2d 855 (2001)). The court in Buckhannon stated that the phrase “prevailing party” is a legal term of art that refers to a “party in whose favor a judgment is rendered.” (quoting Black’s Law Dictionary 1145 (7th ed. 1999)). The court in Mason, *supra*, at 76, held that “requestors are entitled to attorney’s fees under OPRA, absent a judgment or an enforceable consent decree, when they can demonstrate (1) ‘a factual causal nexus between plaintiff’s litigation and the relief ultimately achieved’; and (2) ‘that the relief ultimately secured by plaintiffs had a basis in law.’ Singer v. State, 95 N.J. 487, 495, cert denied (1984).”

In the instant complaint, the Custodian responded to the Complainant's June 18, 2007 OPRA request providing access to the resignation letter of Mr. DiBenedetto dated June 14, 2007 with two (2) redactions. Further, the Custodian responded to the Complainant's July 7, 2007 OPRA request providing access to redacted copies of March 15, 2007 invoices. The Complainant filed a Denial of Access Complaint on September 17, 2007.

In the Denial of Access Complaint, the Complainant's Counsel requested that the GRC find that the Custodian violated OPRA by improperly redacting information from the requested resignation letter and order the Custodian to provide an unredacted copy of the letter of resignation dated June 14, 2007 to the Complainant. Additionally, Counsel requested that the GRC find that the Custodian violated OPRA by not providing a specific basis for the redactions and order the Custodian to provide unredacted copies of the March 15, 2007 invoices to the Complainant.

In its November 4, 2009 Interim Order, the GRC determined that the second (2nd) redaction the Custodian made to the resignation letter of Mr. DiBenedetto was unlawful and ordered the Custodian to provide the letter to the Complainant without said redaction. Further, the GRC examined the information contained in the first (1st) redaction of the March 15, 2007 invoices and held that the Custodian unlawfully denied access to such information. The Custodian provided access to the resignation letter of Mr. DiBenedetto without the second (2nd) redaction on November 16, 2009.⁹

Therefore, pursuant to Teeters, *supra*, the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." *Id.* at 432. Additionally, pursuant to Mason, *supra*, a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6, Teeters, *supra*, and Mason, *supra*. Thus, this complaint should be referred to the Office of Administrative Law for the determination of reasonable prevailing party attorney's fees.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Because the Custodian provided the resignation letter of Mr. DiBenedetto dated June 14, 2007 omitting the second (2nd) redaction to the Complainant as required by the Council's Interim Order, and because the Custodian provided certified confirmation of compliance pursuant to N.J. Court Rule 1:4-4 to the Executive Director within five (5) business days of receiving the Council's Interim Order, the Custodian has complied with the Council's November 4, 2009 Interim Order.

⁹ It was not necessary for the Custodian to disclose the unlawfully denied information on the March 15, 2007 invoice because the GRC did by virtue of identifying same in the *in camera* findings and recommendations included in the November 4, 2009 Interim Order.

2. Although the Custodian unlawfully denied access to the information contained within the second (2nd) redaction of the resignation letter of Mr. DiBenedetto and the first (1st) 02/21/07 NC entry on page 1 of the attorney invoices, because the Custodian complied with the Council's Interim Orders dated August 11, 2009 and November 4, 2009, it is concluded that 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. However, the Custodian's unlawful "deemed" denial of access appears negligent and heedless since he is vested with the legal responsibility of granting and denying access in accordance with the law.

3. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." *Id.* at 432. Additionally, pursuant to Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6, Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), and Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Thus, this complaint should be referred to the Office of Administrative Law for the determination of reasonable prevailing party attorney's fees.

Prepared By: Frank F. Caruso
Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

December 9, 2009



State of New Jersey
GOVERNMENT RECORDS COUNCIL
 101 SOUTH BROAD STREET
 PO BOX 819
 TRENTON, NJ 08625-0819

JON S. CORZINE
Governor

CHARLES A. RICHMAN
Acting Commissioner

INTERIM ORDER

November 4, 2009 Government Records Council Meeting

Howard Kupferman
 Complainant

Complaint No. 2007-213

v.

Long Hill Township Board of Education (Morris)
 Custodian of Record

At the November 4, 2009 public meeting, the Government Records Council (“Council”) considered the October 21, 2009 *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, finds that:

1. The Custodian has complied with the Council’s August 11, 2009 Interim Order by providing the Council with all records set forth in said Order within five (5) business days of receiving the Council’s Order.
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 table below within five (5) business days from receipt of this Order and simultaneously provide certified confirmation of compliance, pursuant to N.J. Court Rules, 1969 R. 1:4-4 (2005), to the Executive Director.**

Record or Redaction Number	Record Name/Date	Description of Record or Redaction	Custodian’s Explanation/ Citation for Non-disclosure or Redactions	Findings of the <i>In Camera</i> Examination¹

¹ 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



1	Resignation Letter from Mr. Art DiBenedetto dated June 14, 2007	Resignation letter from Mr. Art DiBenedetto.	The redacted portions of the resignation letter pertained to an affirmative action complaint.	<p>The first (1st) redaction is appropriate because Mr. DiBenedetto mentions the personnel matter of another individual and <u>N.J.S.A. 47:1A-10</u> exempts from disclosure all personnel records except for certain information and specific records.² The personnel information contained in this resignation letter is not of the nature that is disclosable under <u>N.J.S.A. 47:1A-10</u>.</p> <p>The second (2nd) redaction is not appropriate because that information is not specifically exempted from</p>
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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.

² OPRA provides that the personnel or pension records of any individual in the possession of a public agency, including but not limited to records relating to any grievance filed by or against an individual, shall not be a government record and shall not be made available for public access, except that: an individual's name, title, position, salary, payroll record, length of service, date of separation and the reason therefore, and the amount and type of any pension received shall be a government record, among other records and data.

				access under OPRA as the date and reason for separation of employment of an employee is disclosable pursuant to <u>N.J.S.A. 47:1A-10</u> . Therefore, the Custodian must disclose the redacted information to the Complainant.
2	Schwartz, Simon, Edelstein & Kessler, LLP invoice dated March 15, 2007³	Schwartz, Simon, Edelstein & Kessler, LLP invoice for legal services provided to the Board of Education.	The redacted portions of the invoice dated March 15, 2007 pertained to confidential special education cases.	There were four (4) entries with redactions on these invoices. All redactions are proper because the information redacted is attorney-client privilege. Except that the amount of time (“ 0.75 Hrs ”) is improperly redacted on the first (1 st) 02/21/07 NC entry on page 1. Because the GRC has revealed the missing information as part of these findings, no further disclosure is required.

³ This record differs from the redacted record provided to the GRC by the Complainant as attached to the Denial of Access Complainant. Also, the Custodian provided this record along with an invoice dated April 10, 2007. The April 10, 2007 invoice was not requested for this *in camera* review pursuant to the Council’s August 11, 2009 Interim Order and as such will not be reviewed.

3	Executive Session minutes dated July 11, 2007	Executive Session minutes of the Board of Education.	The redacted portions of the executive session meeting minutes dated June 11, 2007 pertained to a student issue, affirmative action complaint and negotiations.	<p>There are four (4) redacted lines, multiple lines or partial lines on page 1. All four (4) redactions are appropriate because they are discussions of personnel issues and employee evaluations which are exempt from disclosure pursuant to <u>N.J.S.A. 47:1A-10</u>.</p> <p>There are four (4) paragraphs on page 2. (There are no redactions in paragraph 2.)</p> <p><u>Paragraph 1:</u> These redactions are appropriate because the information is exempt from disclosure as information generated by or on behalf of public employers or public employees in connection with any grievance filed by or against an individual pursuant to <u>N.J.S.A. 47:1A-1.1</u>.</p> <p><u>Paragraph 3:</u> These redactions</p>
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				<p>are appropriate because the discussion is exempt from disclosure as advisory, consultative or deliberative material pursuant to <u>N.J.S.A. 47:1A-1.1</u>.</p> <p><u>Paragraph 4:</u> These redactions are appropriate because the discussion is exempt from disclosure as being in connection with collective negotiations, including documents and statements of strategy or negotiating position pursuant to <u>N.J.S.A. 47:1A-1.1</u>.</p>
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3. The Custodian unlawfully denied access to the second (2nd) redaction made to the resignation letter of Mr. DiBenedetto because that information is not specifically exempted from access under OPRA as the date and reason for separation of employment of an employee is disclosable pursuant to N.J.S.A. 47:1A-10. Therefore, the Custodian must disclose the redacted information to the Complainant. Additionally, the Custodian unlawfully denied access to the redaction of the amount of time (“0.75 Hrs”) on the first (1st) 02/21/07 NC entry on page 1 of the attorney invoices. Because the GRC has revealed the missing information as part of these findings, no further disclosure is required.

Interim Order Rendered by the
Government Records Council
On The 4th Day of November, 2009

Robin Berg Tabakin, Chair
Government Records Council

I attest the foregoing is a true and accurate record of the Government Records Council.

Janice L. Kovach, Secretary
Government Records Council

Decision Distribution Date: November 6, 2009

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

***In Camera* Findings and Recommendations of the Executive Director
November 4, 2009 Council Meeting**

**Howard Kupferman¹
Complainant**

GRC Complaint No. 2007-213

v.

**Long Hill Township Board of Education (Morris)²
Custodian of Records**

Records Relevant to Complaint:

June 5, 2007 OPRA request:

Any and all invoices and payment vouchers for legal services regarding any litigation by the Complainant.

June 18, 2007 OPRA request:

Letter of resignation from Mr. Art DiBenedetto (“Mr. DiBenedetto”) to Ms. Suzanne Becker (“Ms. Becker”), Board of Education President, and the Custodian dated June 14, 2007.

July 7, 2007 OPRA request:

Records obtained from legal counsel and all notes made during the conversation with counsel on the following dates:

1. February 21, 2007.
2. February 26, 2007.
3. February 28, 2007.
4. March 15, 2007.
5. March 15, 2007.
6. March 30, 2007.

July 16, 2007 OPRA request:

Executive session meeting minutes for the June 11, 2007 Board of Education (“BOE”) meeting.

August 17, 2007 OPRA request:

1. Invoices included in the “Bills List” for August 1, 2007 to be approved per Resolution 5 of the August 20, 2007 Agenda.
2. Invoices included in the “Bills List” for August 20, 2007 to be approved per Resolution 5 of the August 20, 2007 Agenda.³

¹ Represented by Walter M. Luers, Esq., Law Offices of Walter Luers, LLC (Oxford, NJ).

² No legal representation listed on record.

³ Additional records were requested which are not relevant to this complaint.

Requests Made: June 5, 2007; June 18, 2007; July 7, 2007; July 16, 2007; August 17, 2007
Responses Made: June 5, 2007; June 25, 2007; July 17, 2007; July 24, 2007; August 20, 2007

Custodian: John Esposito

GRC Complaint Filed: September 17, 2007⁴

Records Submitted for *In Camera* Examination:

- (1) The resignation letter from Mr. Art DiBenedetto
- (2) The Schwartz, Simon, Edelstein & Kessler, LLP invoice dated March 15, 2007
- (3) Executive Session meeting minutes dated June 11, 2007

Background

August 11, 2009

Government Records Council's Interim Order. At the August 11, 2009 public meeting, the Government Records Council ("Council") considered the August 4, 2009 Executive Director's Findings and Recommendations 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 responded to the Complainant's June 5, 2007 OPRA request on the same business day as receipt of the Complainant's request, stating that no records responsive to the Complainant's OPRA request exist, the Custodian subsequently certified in the Statement of Information that no records which are responsive to the request exist and there is no credible evidence in the record to refute the Custodian's certification. Therefore, the Custodian did not unlawfully deny access to the requested records pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).
2. Pursuant to Shain v. Ocean County Board of Taxation (Ocean), GRC Complaint No. 2007-159 (June 2008), the Custodian did not unlawfully deny access to copies of the invoices requested in the Complainant's August 15, 2007 OPRA request because the invoices were in use by the Long Hill Township Board of Education at the time of the Complainant's request.
3. Pursuant to Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005), the GRC must conduct an *in camera* review of the resignation letter from Mr. DiBenedetto to Ms. Becker and the Custodian dated June 14, 2007, the Schwartz, Simon, Edelstein Celso & Kessler, LLP invoice dated March 15, 2007 and the June 11, 2007 executive session meeting minutes in order to determine the validity of the Custodian's assertion that the redactions constitute information which is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1.

⁴ The GRC received the Denial of Access Complaint on said date.

4. **The Custodian must deliver⁵ to the Council in a sealed envelope nine (9) copies of the requested unredacted documents (see No. 3 above), a document or redaction index⁶, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4⁷, that the documents provided are the documents 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.
6. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

August 12, 2009

Council's Interim Order ("Order") distributed to the parties.

August 18, 2009

Certification of the Custodian in response to the Council's Interim Order with the following attachments:

- (1) The resignation letter from Mr. Art DiBenedetto
- (2) The Schwartz, Simon, Edelstein & Kessler, LLP invoice dated March 15, 2007
- (3) Executive Session meeting minutes dated June 11, 2007

The Custodian certifies that he is the Business Administrator and the Custodian of the Long Hill Township Board of Education and that the records enclosed are the true and complete copies of the records requested by the Council for an *in camera* review pursuant to its August 11, 2009 Interim Order.

Analysis

Whether the Custodian complied with the Council's August 11, 2009 Interim Order?

At its August 11, 2009 public meeting, the Council held that it must determine whether the legal conclusion asserted by the Custodian is properly applied to the records at issue pursuant to Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005) because the Custodian has asserted that the redacted portions of the requested records were lawfully denied because:

⁵ The *in camera* documents may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as they arrive at the GRC office by the deadline.

⁶ The document or redaction index should identify the document and/or each redaction asserted and the lawful basis for the denial.

⁷ "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."

- (1) the redacted portions of the resignation letter dated June 14, 2007 pertained to an affirmative action complaint;
- (2) the redacted portions of the invoice dated March 15, 2007 pertained to confidential special education cases; and
- (3) the redacted portions of the executive session meeting minutes dated June 11, 2007 pertained to a student issue, affirmative action complaint and negotiations.

Therefore, the Council must conduct an *in camera* review of the requested records to determine the validity of the Custodian's assertion that the requested records were properly denied.

The Council therefore ordered the Custodian to deliver to the Council in a sealed envelope nine (9) copies of the requested unredacted documents, a document or redaction index, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4, that the documents provided are the documents requested by the Council for the *in camera* inspection. Such delivery was to be received by the GRC within five (5) business days from receipt of the Council's Interim Order or on August 19, 2009.

The Custodian provided the GRC with the requested records and the Custodian's certification reiterating that all the records are exempt from disclosure as advisory, consultative or deliberative material, and a document index in compliance with the Council's August 11, 2009 Interim Order in a timely manner. Therefore, the Custodian complied with the Council's August 11, 2009 Interim Order.

Whether the Custodian unlawfully denied the Complainant access to the redacted portions of the requested records?

The Custodian asserts that the redactions made to the requested records at issue for the Council's *in camera* review were appropriate for the following reasons for each record:

- (1) The resignation letter from Mr. Art DiBenedetto – The redacted portions of the resignation letter pertained to an affirmative action complaint.
- (2) The Schwartz, Simon, Edelstein & Kessler, LLP invoice dated March 15, 2007 – The redacted portions of the invoice dated March 15, 2007 pertained to confidential special education cases.
- (3) Executive Session meeting minutes dated June 11, 2007 – The redacted portions of the executive session meeting minutes dated June 11, 2007 pertained to a student issue, affirmative action complaint and negotiations.

While the Custodian has not clearly articulated any of the twenty-four (24) specific exemptions contained in OPRA, the GRC recognizes that the several OPRA exemptions are at issue in this complaint.

Personnel Records

OPRA provides that the personnel or pension records of any individual in the Howard Kupferman v. Long Hill Township Board of Education (Morris), 2007-213 – *In Camera* Findings and Recommendations of the Executive Director 4

possession of a public agency, including but not limited to records relating to any grievance filed by or against an individual, shall not be considered a government record and shall not be made available for public access, except that:

- an individual's name, title, position, salary, payroll record, length of service, date of separation and the reason therefor, and the amount and type of any pension received shall be a government record;
- personnel or pension records of any individual shall be accessible when required to be disclosed by another law, when disclosure is essential to the performance of official duties of a person duly authorized by this State or the United States, or when authorized by an individual in interest; and
- data contained in information which disclose conformity with specific experiential, educational or medical qualifications required for government employment or for receipt of a public pension, but not including any detailed medical or psychological information, shall be a government record. N.J.S.A. 47:1A-10.

Attorney-Client Privilege

OPRA excludes from the definition of a government record any record within the attorney client privilege. N.J.S.A. 47:1A-1.1. In New Jersey, protecting confidentiality within the attorney-client relationship has long been recognized by the courts. *See, e.g. Matter of Grand Jury Subpoenas*, 241 N.J. Super. 18 (App. Div. 1989). In general, the attorney-client privilege renders as confidential communications between a lawyer and a client made in the course of that professional relationship. *See N.J.S.A. 2A: 84A-20 and Fellerman v. Bradley*, 99 N.J. 493, 498-99 (1985). Rule 504 (1) of the New Jersey Rules of Evidence provides that communications between a lawyer and client, “in the course of that relationship and in professional confidence, are privileged...” Such communications as discussion of litigation strategy, evaluation of liability, potential monetary exposure and settlement recommendations are considered privileged. The Press of Atlantic City v. Ocean County Joint Insurance Fund, 337 N.J. Super. 480, 487 (Law Div. 2000). Also confidential are mental impressions, legal conclusions, and opinions or theories of attorneys. In Re Environmental Ins. Actions, 259 N.J. Super. 308, 317 (App. Div. 1992).

The attorney-client privilege "recognizes that sound legal advice or advocacy serves public ends and that the confidentiality of communications between client and attorney constitutes an indispensable ingredient of our legal system." Matter of Grand Jury Subpoenas, 241 N.J. Super. 18, 27-8 (App.Div.1989). The attorney-client privilege protects communications between a lawyer and the client made in the course of that professional relationship, and particularly protects information which, if disclosed, would jeopardize the legal position of the client. N.J.S.A. 2A:84A-20; RPC 1.6. The New Jersey Supreme Court has observed that RPC 1.6 “expands the scope of protected information to include all information relating to the representation, regardless of the source or whether the client has requested it be kept confidential or whether disclosure of the information would be embarrassing or detrimental to the client.” In re Advisory Opinion No. 544 of N.J. Sup. Court, 103 N.J. 399, 406 (1986).

Redaction of otherwise public documents is appropriate where protection of privileged or confidential subject matter is a concern. South Jersey Publishing Co., Inc. v. N. J. Expressway Authority, 124 N.J. 478, 488-9 (1991). Moreover, whether the matter contained in the requested documents pertains to pending or closed cases is important, because the need for confidentiality is greater in pending matters. Keddie v. Rutgers, State University, 148 N.J. 36, 54 (1997). Nevertheless, "[e]ven in closed cases. . . attorney work-product and documents containing legal strategies may be entitled to protection from disclosure." *Id.*

Information Generated By or On Behalf of Public Employers or Public Employees in Connection with a Grievance

Also, OPRA exempts from disclosure "... information which is deemed to be confidential ... information generated by or on behalf of public employers or public employees in connection with ... any grievance filed by or against an individual ..." N.J.S.A. 47:1A-1.1.

Advisory, Consultative or Deliberative ("ACD") Material

OPRA excludes from the definition of a government record "inter-agency or intra-agency advisory, consultative or deliberative material." N.J.S.A. 47:1A-1.1. It is evident that this phrase is intended to exclude from the definition of a government record the types of documents that are the subject of the "deliberative process privilege."

In O'Shea v. West Milford Board of Education, GRC Complaint No. 2004-93 (April 2006), the Council stated that "neither the statute nor the courts have defined the terms... 'advisory, consultative, or deliberative' in the context of the public records law. The Council looks to an analogous concept, the deliberative process privilege, for guidance in the implementation of OPRA's ACD exemption. Both the ACD exemption and the deliberative process privilege enable a governmental entity to shield from disclosure material that is pre-decisional and deliberative in nature. Deliberative material contains opinions, recommendations, or advice about agency policies. In Re the Liquidation of Integrity Insurance Company, 165 N.J. 75, 88 (2000); In re Readoption With Amendments of Death Penalty Regulations, 182 N.J.149 (App. Div. 2004)."

The deliberative process privilege is a doctrine that permits government agencies to withhold documents that reflect advisory opinions, recommendations and deliberations submitted as part of a process by which governmental decisions and policies are formulated. NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 150, 95 S. Ct. 1504, 1516, 44 L. Ed. 2d 29, 47 (1975). Specifically, the New Jersey Supreme Court has 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. Education Law Center v. NJ Department of Education, 198 N.J. 274, 966 A.2d 1054, 1069 (2009). This long-recognized privilege is rooted in the concept that the sovereign has an interest in protecting the integrity of its deliberations. The earliest federal case adopting the privilege is Kaiser Alum. & Chem.

Corp. v. United States, 157 F. Supp. 939 (1958). The privilege and its rationale were subsequently adopted by the federal district courts and circuit courts of appeal. United States v. Farley, 11 F.3d 1385, 1389 (7th Cir.1993).

The deliberative process privilege was discussed at length in In Re Liquidation of Integrity Insurance Co., 165 N.J. 75 (2000). There, the court addressed the question of whether the Commissioner of Insurance, acting in the capacity of Liquidator of a regulated entity, could protect certain records from disclosure which she claimed contained opinions, recommendations or advice regarding agency policy. *Id.* at 81. The court adopted a qualified deliberative process privilege based upon the holding of McClain v. College Hospital, 99 N.J. 346 (1985), Liquidation of Integrity, *supra*, 165 N.J. at 88. In doing so, the court noted that:

“[a] document must meet two requirements for the deliberative process privilege to apply. 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. ... Purely factual material that does not reflect deliberative processes is not protected. ... Once the government demonstrates that the subject materials meet those threshold requirements, the privilege comes into play. In such circumstances, the government's interest in candor is the "preponderating policy" and, prior to considering specific questions of application, the balance is said to have been struck in favor of non-disclosure.” (*Citations omitted.*) *Id.* at 84-85.

The court further set out procedural guidelines based upon those discussed in McClain:

“[t]he initial burden falls on the state agency to show that the documents it seeks to shield are pre-decisional and deliberative in nature (containing opinions, recommendations, or advice about agency policies). Once the deliberative nature of the documents is established, there is a presumption against disclosure. The burden then falls on the party seeking discovery to show that his or her compelling or substantial need for the materials overrides the government's interest in non-disclosure. Among the considerations are the importance of the evidence to the movant, its availability from other sources, and the effect of disclosure on frank and independent discussion of contemplated government policies.” In Re Liquidation of Integrity, *supra*, 165 N.J. at 88, *citing McClain*, *supra*, 99 N.J. at 361-62.

In In Re Liquidation of Integrity, *supra*, 165 N.J. at 84-5, the judiciary set forth the legal standard for applying the deliberative process privilege as follows:

- (1) The initial burden falls on the government agency to establish that matters are both *pre-decisional* and *deliberative*.

- a. Pre-decisional means that the records were generated before an agency adopted or reached its decision or policy.
 - b. Deliberative means that the record contains opinions, recommendations, or advice about agency policies or decisions.
 - i. Deliberative materials do not include purely factual materials.
 - ii. Where factual information is contained in a record that is deliberative, such information must be produced so long as the factual material can be separated from its deliberative context.
 - c. The exemption covers recommendations, draft documents, proposals, suggestions, and other subjective documents *which reflect the personal opinions of the writer rather than the policy of the agency*.
 - d. Documents which are protected by the privilege are those which *would inaccurately reflect or prematurely disclose the views of the agency, suggesting as agency position that which is only a personal position*.
 - e. To test whether disclosure of a document is likely to adversely affect the purposes of the privilege, courts ask themselves *whether the document is so candid or personal in nature that public disclosure is likely in the future to stifle honest and frank communications within the agency*.
- (2) Please note that if an *in camera* inspection were conducted by the courts, the process would include the following:

Once it has been determined that a record is deliberative, there is a presumption against disclosure and the party seeking the document has the burden of establishing his or her compelling or substantial need for the record.

- a. That burden can be met by a showing of:
 - i. the importance of the information to the requesting party,
 - ii. its availability from other sources, **and**
 - iii. the effect of disclosure on frank and independent discussion of contemplated government policies.

Information Generated By or On Behalf of Public Employers or Public Employees in Connection with Collective Negotiation

Further, OPRA exempts from disclosure “... information which is deemed to be confidential ... information generated by or on behalf of public employers or public employees ... in connection with collective negotiations, including documents and statements of strategy or negotiating position ...” N.J.S.A. 47:1A-1.1.

The GRC conducted an *in camera* examination on the submitted records. The results of this examination are set forth in the following table:

Record or Redaction Number	Record Name/Date	Description of Record or Redaction	Custodian's Explanation/ Citation for Non-disclosure or Redactions	Findings of the <i>In Camera</i> Examination ⁸
1	Resignation Letter from Mr. Art DiBenedetto dated June 14, 2007	Resignation letter from Mr. Art DiBenedetto.	The redacted portions of the resignation letter pertained to an affirmative action complaint.	The first (1 st) redaction is appropriate because Mr. DiBenedetto mentions the personnel matter of another individual and <u>N.J.S.A. 47:1A-10</u> exempts from disclosure all personnel records except for certain information and specific records. ⁹ The personnel information contained in this resignation letter is not of the nature

⁸ **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.

⁹ OPRA provides that the personnel or pension records of any individual in the possession of a public agency, including but not limited to records relating to any grievance filed by or against an individual, shall not be a government record and shall not be made available for public access, except that: an individual's name, title, position, salary, payroll record, length of service, date of separation and the reason therefore, and the amount and type of any pension received shall be a government record, among other records and data.

				<p>that is disclosable under <u>N.J.S.A. 47:1A-10</u>.</p> <p>The second (2nd) redaction is not appropriate because that information is not specifically exempted from access under OPRA as the date and reason for separation of employment of an employee is disclosable pursuant to <u>N.J.S.A. 47:1A-10</u>. Therefore, the Custodian must disclose the redacted information to the Complainant.</p>
2	Schwartz, Simon, Edelstein & Kessler, LLP invoice dated March 15, 2007¹⁰	Schwartz, Simon, Edelstein & Kessler, LLP invoice for legal services provided to the Board of Education.	The redacted portions of the invoice dated March 15, 2007 pertained to confidential special education cases.	There were four (4) entries with redactions on these invoices. All redactions are proper because the information redacted is attorney-client privilege. Except that the amount of time (“ 0.75 Hrs ”) is improperly redacted on the first (1 st) 02/21/07 NC entry on page 1. Because the

¹⁰ This record differs from the redacted record provided to the GRC by the Complainant as attached to the Denial of Access Complainant. Also, the Custodian provided this record along with an invoice dated April 10, 2007. The April 10, 2007 invoice was not requested for this *in camera* review pursuant to the Council’s August 11, 2009 Interim Order and as such will not be reviewed.
Howard Kupferman v. Long Hill Township Board of Education (Morris), 2007-213 – *In Camera* Findings and Recommendations of the Executive Director

				GRC has revealed the missing information as part of these findings, no further disclosure is required.
3	Executive Session minutes dated July 11, 2007	Executive Session minutes of the Board of Education.	The redacted portions of the executive session meeting minutes dated June 11, 2007 pertained to a student issue, affirmative action complaint and negotiations.	<p>There are four (4) redacted lines, multiple lines or partial lines on page 1. All four (4) redactions are appropriate because they are discussions of personnel issues and employee evaluations which are exempt from disclosure pursuant to <u>N.J.S.A. 47:1A-10</u>.</p> <p>There are four (4) paragraphs on page 2. (There are no redactions in paragraph 2.)</p> <p><u>Paragraph 1:</u> These redactions are appropriate because the information is exempt from disclosure as information generated by or on behalf of public employers or public employees in connection with any grievance filed by or against</p>

				<p>an individual pursuant to <u>N.J.S.A. 47:1A-1.1.</u></p> <p><u>Paragraph 3:</u> These redactions are appropriate because the discussion is exempt from disclosure as advisory, consultative or deliberative material pursuant to <u>N.J.S.A. 47:1A-1.1.</u></p> <p><u>Paragraph 4:</u> These redactions are appropriate because the discussion is exempt from disclosure as being in connection with collective negotiations, including documents and statements of strategy or negotiating position pursuant to <u>N.J.S.A. 47:1A-1.1.</u></p>
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Thus, the Custodian unlawfully denied access to the second (2nd) redaction made to the resignation letter of Mr. DiBenedetto because that information is not specifically exempted from access under OPRA as the date and reason for separation of employment of an employee is disclosable pursuant to N.J.S.A. 47:1A-10. Therefore, the Custodian must disclose the redacted information to the Complainant. Additionally, the Custodian unlawfully denied access to the redaction of the amount of time (“0.75 Hrs”) on the first (1st)

02/21/07 NC entry on page 1 of the attorney invoices. Because the GRC has revealed the missing information as part of these findings, no further disclosure is required.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian has complied with the Council's August 11, 2009 Interim Order by providing the Council with all records set forth in said Order within five (5) business days of receiving the Council's Order.
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 and simultaneously provide certified confirmation of compliance, pursuant to N.J. Court Rules, 1969 R. 1:4-4 (2005), to the Executive Director.**
3. The Custodian unlawfully denied access to the second (2nd) redaction made to the resignation letter of Mr. DiBenedetto because that information is not specifically exempted from access under OPRA as the date and reason for separation of employment of an employee is disclosable pursuant to N.J.S.A. 47:1A-10. Therefore, the Custodian must disclose the redacted information to the Complainant. Additionally, the Custodian unlawfully denied access to the redaction of the amount of time ("0.75 Hrs") on the first (1st) 02/21/07 NC entry on page 1 of the attorney invoices. Because the GRC has revealed the missing information as part of these findings, no further disclosure is required.

Prepared and
Approved By: Catherine Starghill, Esq.
Executive Director

October 21, 2009



State of New Jersey
GOVERNMENT RECORDS COUNCIL
101 SOUTH BROAD STREET
PO BOX 819
TRENTON, NJ 08625-0819

JON S. CORZINE
Governor

CHARLES A. RICHMAN
Acting Commissioner

INTERIM ORDER

August 11, 2009 Government Records Council Meeting

Howard Kupferman
Complainant

Complaint No. 2007-213

v.

Long Hill Township Board of Education (Morris)
Custodian of Record

At the August 11, 2009 public meeting, the Government Records Council ("Council") considered the August 4, 2009 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 responded to the Complainant's June 5, 2007 OPRA request on the same business day as receipt of the Complainant's request, stating that no records responsive to the Complainant's OPRA request exist, the Custodian subsequently certified in the Statement of Information that no records which are responsive to the request exist and there is no credible evidence in the record to refute the Custodian's certification. Therefore, the Custodian did not unlawfully deny access to the requested records pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).
2. Pursuant to Shain v. Ocean County Board of Taxation (Ocean), GRC Complaint No. 2007-159 (June 2008), the Custodian did not unlawfully deny access to copies of the invoices requested in the Complainant's August 15, 2007 OPRA request because the invoices were in use by the Long Hill Township Board of Education at the time of the Complainant's request.
3. Pursuant to Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005), the GRC must conduct an *in camera* review of the resignation letter from Mr. DiBenedetto to Ms. Becker and the Custodian dated June 14, 2007, the Schwartz, Simon, Edelstein Celso & Kessler, LLP invoice dated March 15, 2007 and the June 11, 2007 executive session meeting minutes in order to determine the validity of the Custodian's assertion that the redactions constitute information which is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1.



4. **The Custodian must deliver¹ to the Council in a sealed envelope nine (9) copies of the requested unredacted documents (see No. 3 above), a document or redaction index², as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4³, that the documents provided are the documents 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.
6. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Interim Order Rendered by the
Government Records Council
On The 11th Day of August, 2009

Robin Berg Tabakin, Chair
Government Records Council

I attest the foregoing is a true and accurate record of the Government Records Council.

Janice L. Kovach
Government Records Council

Decision Distribution Date: August 12, 2009

¹ The *in camera* documents may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as they arrive at the GRC office by the deadline.

² The document or redaction index should identify the document 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
August 11, 2009 Council Meeting**

**Howard Kupferman¹
Complainant**

GRC Complaint No. 2007-213

v.

**Long Hill Township Board of Education (Morris)²
Custodian of Records**

Records Relevant to Complaint:

June 5, 2007 OPRA request:

Any and all invoices and payment vouchers for legal services regarding any litigation by the Complainant.

June 18, 2007 OPRA request:

Letter of resignation from Mr. Art DiBenedetto (“Mr. DiBenedetto”) to Ms. Suzanne Becker (“Ms. Becker”), Board of Education President, and the Custodian dated June 14, 2007.

July 7, 2007 OPRA request:

Records obtained from legal counsel and all notes made during the conversation with counsel on the following dates:

1. February 21, 2007.
2. February 26, 2007.
3. February 28, 2007.
4. March 15, 2007.
5. March 15, 2007.
6. March 30, 2007.

July 16, 2007 OPRA request:

Executive session meeting minutes for the June 11, 2007 Board of Education (“BOE”) meeting.

August 17, 2007 OPRA request:

1. Invoices included in the “Bills List” for August 1, 2007 to be approved per Resolution 5 of the August 20, 2007 Agenda.
2. Invoices included in the “Bills List” for August 20, 2007 to be approved per Resolution 5 of the August 20, 2007 Agenda.³

¹ Represented by Walter M. Luers, Esq., Law Offices of Walter Luers, LLC (Oxford, NJ).

² No legal representation listed on record.

³ Additional records were requested which are not relevant to this complaint.

Request Made: June 5, 2007; June 18, 2007; July 7, 2007; July 16, 2007; August 17, 2007

Response Made: June 5, 2007; June 25, 2007; July 17, 2007; July 24, 2007; August 20, 2007

Custodian: John Esposito

GRC Complaint Filed: September 17, 2007⁴

Background

June 5, 2007

Complainant's first (1st) Open Public Records Act ("OPRA") request. The Complainant requests the records relevant to this complaint listed above on an official OPRA request form. The Complainant requests that these records be provided via e-mail.

June 5, 2007

Custodian's response to the first (1st) OPRA request. The Custodian responds in writing to the Complainant's June 5, 2007 OPRA request on the same business day following receipt of such request. The Custodian states that no records responsive exist.⁵

June 18, 2007

Complainant's second (2nd) OPRA request. The Complainant requests the record relevant to this complaint listed above on an official OPRA request form. The Complainant requests that this record be provided via e-mail.

June 25, 2007

Custodian's response to the second (2nd) OPRA request. The Custodian responds in writing to the Complainant's June 18, 2007 OPRA request on the fifth (5th) business day following receipt of such request. The Custodian states that access to the requested letter is granted with minor redactions of information relating to an affirmative action case. The Custodian attaches a letter of resignation from Mr. DiBenedetto to Ms. Becker and the Custodian dated June 14, 2007 with redactions.

July 1, 2007

E-mail from the Complainant to the Custodian. The Complainant states that the Custodian has failed to comply with the Complainant's June 5, 2007 OPRA request. The Complainant avers that he will file a complaint with the Government Records Council if the Custodian does not respond immediately.

July 7, 2007

Complainant's third (3rd) OPRA request. The Complainant requests the records relevant to this complaint listed above on an official OPRA request form. The Complainant requests that these records be provided via e-mail.

⁴ The GRC received the Denial of Access Complaint on said date.

⁵ The Complainant acknowledged receipt of the Custodian's response in an e-mail to the Custodian on June 5, 2007.

July 16, 2007

E-mail from the Custodian to the Complainant. The Custodian states that he responded to the Complainant's June 5, 2007 OPRA request via e-mail on June 5, 2007.⁶

July 16, 2007

Custodian's response to the third (3rd) OPRA request. The Custodian responds in writing to the Complainant's July 7, 2007 OPRA request on the same day following receipt of such request. The Custodian states that he has just returned to the office from a conference and will review and respond to the Complainant's July 7, 2007 OPRA request.

July 16, 2007

Complainant's fourth (4th) OPRA request. The Complainant requests the record relevant to this complaint listed above on an official OPRA request form. The Complainant requests that this record be provided via e-mail.

July 17, 2007

E-mail from the Custodian to the Complainant attaching a Schwartz, Simon, Edelstein Celso & Kessler, LLP invoice dated March 15, 2007 with redactions. The Custodian states that the attached invoice is responsive to the Complainant's July 7, 2007 OPRA request.⁷

July 24, 2007

Custodian's response to the fourth (4th) OPRA request. The Custodian responds in writing to the Complainant's July 16, 2007 OPRA request on the fifth (5th) business day following receipt of such request. The Custodian states that access to the requested executive session meeting minutes is granted. The Custodian states that information involving staff, students and litigation has been redacted as confidential information exempt from disclosure under OPRA. The Custodian attaches Long Hill Township BOE executive session meeting minutes dated June 11, 2007 with redactions.

August 17, 2007

Complainant's fifth (5th) OPRA request. The Complainant requests the records relevant to this complaint listed above on an official OPRA request form. The Complainant requests that these records be provided via e-mail.

August 20, 2007

Ms. Lori A. Karasewicz's ("Ms. Karasewicz"), Financial Supervisor, response to the fifth (5th) OPRA request. On behalf of the Custodian, Ms. Karasewicz responds in writing to the Complainant's August 17, 2007 OPRA request, on the same business day as receipt of such request.⁸ Ms. Karasewicz states that per Mr. Ken Gross ("Mr. Gross"), Interim Superintendent, copies of the requested invoices cannot be made. Ms.

⁶ The Complainant responded to the Custodian's July 16, 2007 e-mail on July 20, 2007 stating that recent computer problems resulted in the deletion of the Custodian's June 5, 2007 response.

⁷ The Custodian did not provide a reason for redactions made to the invoice at the time that access was provided.

⁸ The evidence of record shows that the Complainant's OPRA request was faxed to the Custodian after business hours on August 17, 2007.

Karasewicz states that Mr. Gross advised that the Complainant may review the requested invoices at the Business Office. Ms. Karasewicz advises the Complainant that he may contact the Custodian or Mr. Gross with any questions regarding this matter.

August 20, 2007

E-mail from the Complainant to Ms. Karasewicz. The Complainant asserts that Mr. Gross's denial of access to copies of the requested invoices responsive to the Complainant's August 17, 2007 OPRA request is unlawful. The Complainant avers that Mr. Gross's denial violates N.J.S.A. 47:1A-5.d. because Mr. Gross denied access to copies of the requested invoices in the requested medium.

Additionally, the Complainant avers that according to N.J.S.A. 47:1A-5.e., the requested invoices are immediate access records and it is impossible for the Complainant to inspect such records immediately.

Further, the Complainant argues that the BOE failed to return the OPRA request form and additionally failed to provide a specific lawful basis for the denial of copies of the requested invoices, as required by N.J.S.A. 47:1A-5.g. The Complainant states that because the Custodian has refused to accept any OPRA requests not on the BOE's official OPRA request form, the Complainant insists that the Custodian also comply with OPRA by responding on the official request form.

Finally, the Complainant states that if the requested invoices are not forwarded to the Complainant within the appropriate time period or if the specific lawful basis for denial of e-mailed copies of the requested invoices is not provided to the Complainant, the Complainant will contact Counsel and seek relief at the appropriate venue.

September 17, 2007

Denial of Access Complaint filed with the Government Records Council ("GRC") with the following attachments:

- Complainant's first (1st) OPRA request dated June 5, 2007.
- E-mail from the Complainant to the Custodian dated July 1, 2007.
- Letter of resignation from Mr. DiBenedetto to Ms. Becker and the Custodian dated June 14, 2007 with redactions.⁹
- Schwartz, Simon, Edelstein Celso & Kessler, LLP invoice dated March 15, 2007 with redactions.¹⁰
- Long Hill Township BOE executive session meeting minutes dated June 11, 2007 with redactions.¹¹
- Complainant's fifth (5th) OPRA request dated August 17, 2007.
- E-mail from Ms. Karasewicz to the Complainant dated August 20, 2007.
- E-mail from the Complainant to Ms. Karasewicz dated August 20, 2007.¹²

⁹ This record is responsive to the Complainant's second (2nd) OPRA request dated June 18, 2007.

¹⁰ This record is responsive to the Complainant's third (3rd) OPRA request dated July 7, 2007.

¹¹ This record is responsive to the Complainant's fourth (4th) OPRA request dated July 16, 2007.

¹² Counsel also attached an OPRA request which is not at issue of this complaint.

Counsel contends that the Complainant submitted several OPRA requests over the course of nearly three (3) months and takes issue with the Custodian's responses as follows:

June 5, 2007 OPRA request:

Counsel states that the Complainant submitted an OPRA request to the Custodian on June 5, 2007. Counsel contends that the Custodian never responded to the Complainant's request and failed to respond to a follow-up e-mail from the Complainant dated July 1, 2007. Counsel argues that the Custodian should have granted immediate access to the invoices and vouchers requested because the Complainant advised that he wanted to receive the records responsive via e-mail. Counsel requests that the GRC find that the Custodian violated OPRA by failing to provide immediate access to the requested invoices and vouchers.

June 18, 2007 OPRA request:¹³

Counsel states that the letter of resignation from Mr. DiBenedetto to Ms. Becker and the Custodian dated June 14, 2007 was provided to the Complainant with redactions. Counsel asserts that the Custodian claims that the redactions are related to an affirmative action case pending against the BOE. Counsel argues that the existence of legal actions against the BOE is not information exempt from disclosure under OPRA. Counsel asserts that a copy of the unredacted record should be provided because the Custodian failed to cite a specific basis in OPRA for said redactions. Counsel requests that the GRC find that the Custodian violated OPRA by improperly redacting information from the requested record and order the Custodian to provide an unredacted copy of the letter of resignation dated June 14, 2007 to the Complainant.

July 7, 2007 OPRA request:¹⁴

Counsel states that the Complainant received redacted invoices dated March 15, 2007 in response to this OPRA request. Counsel asserts that despite the Complainant's request for clarification, the Custodian failed to cite a specific basis for the redactions made in the invoices, thus making it impossible to determine whether the redactions were appropriate. Counsel requests that the GRC find that the Custodian violated OPRA by not providing a specific basis for the redactions and order the Custodian to provide unredacted copies of the March 15, 2007 invoices to the Complainant.

July 16, 2007 OPRA request:

Counsel states that, in response to this OPRA request, the Complainant received copies of the BOE's June 11, 2007 executive session meeting minutes with several

¹³ In the Denial of Access Complaint, Counsel misidentifies the resignation letter responsive to the Complainant's June 18, 2007 OPRA request as responsive to the Complainant's July 31, 2007 OPRA request, which is attached.

¹⁴ In the Denial of Access Complaint, Counsel asserts that the invoices responsive to the Complainant's July 7, 2007 OPRA request were provided to the Complainant on or about July 27, 2007; however, the evidence of record shows that the Custodian provided access to the invoices via e-mail on July 17, 2007. Howard Kupferman v. Long Hill Township Board of Education (Morris), 2007-213 – Findings and Recommendations of the Executive Director

redactions. Counsel contends that the Custodian failed to provide a specific basis for the redactions, making it impossible to determine whether the redactions were proper. Counsel requests that the GRC find that the Custodian violated OPRA by failing to cite a specific basis for the redactions and order the Custodian to provide unredacted copies of the BOE's June 11, 2007 executive session meeting minutes to the Complainant.

August 17, 2007 OPRA request:

Counsel states that the Complainant submitted an OPRA request to the Custodian on August 17, 2007. Counsel states that Ms. Karasewicz responded on August 20, 2007, denying access to copies of the requested records per Mr. Gross but stating that the Complainant could inspect the requested records at the Business Office.

Counsel contends that the BOE denied access to copies of the requested invoices without any specific basis for said denial. Counsel requests that the GRC find that the Custodian violated OPRA by failing to provide copies of the requested records and order the Custodian to provide copies of the requested invoices to the Complainant.

Additionally, Counsel requests that the GRC find the Custodian to have knowingly and willfully violated OPRA and find that the Complainant is a prevailing party entitled to reasonable attorney's fees pursuant to N.J.S.A. 47:1A-6.

October 15, 2007¹⁵

Request for the Statement of Information ("SOI") sent to the Custodian.

October 22, 2007

Custodian's SOI with the following attachments:

- Complainant's first (1st) OPRA request dated June 5, 2007.
- E-mail from the Custodian to the Complainant dated June 5, 2007.
- Complainant's second (2nd) OPRA request dated June 18, 2007.
- Letter from the Custodian to the Complainant dated June 25, 2007, attaching a letter of resignation from Mr. DiBenedetto to Ms. Becker and the Custodian dated June 14, 2007 with redactions.
- E-mail from the Complainant to the Custodian dated July 1, 2007.
- Complainant's third (3rd) OPRA request dated July 7, 2007.¹⁶
- E-mail from the Custodian to the Complainant dated July 16, 2007.
- Complainant fourth (4th) OPRA request dated July 16, 2007.
- E-mail from the Custodian to the Complainant dated July 17, 2007.
- Schwartz, Simon, Edelstein Celso & Kessler, LLP invoice dated March 15, 2007 with redactions.
- E-mail from the Custodian to the Complainant dated July 24, 2007.
- Complainant's fifth (5th) OPRA request dated August 17, 2007.

¹⁵ The evidence of record is not clear as to what date both parties were offered mediation. However, Counsel acknowledged in an e-mail to the GRC on July 17, 2008 that the Complainant did not wish to mediate this complaint.

¹⁶ The copy of the OPRA request submitted to the GRC bore the date "October 16, 2007."
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- E-mail from Ms. Karasewicz to the Complainant dated August 20, 2007.
- Long Hill Township BOE Check Register from August 1, 2007 to August 30, 2007.
- Long Hill Township BOE Executive session meeting minutes dated June 11, 2007 with redactions.¹⁷

The Custodian certifies that each request was handled in the following manner:

June 5, 2007 OPRA request:

The Custodian certifies that he responded in writing to the Complainant's June 5, 2007 OPRA request on the same day stating that no records responsive exist. The Custodian avers that the Complainant failed to provide in the Denial of Access Complaint the Custodian's initial June 5, 2007 response and subsequent July 16, 2007 response to the Complainant's July 1, 2007 e-mail.¹⁸

June 18, 2007 OPRA request:

The Custodian certifies that he responded in writing to the Complainant's June 18, 2007 OPRA request on June 25, 2007 providing access to the requested letter of resignation. The Custodian certifies that, in a cover letter accompanying the requested letter, he advised the Complainant that redactions were made pertaining to information relating to an affirmative action case.

The Custodian states that he responded to this OPRA request in writing within the statutorily mandated seven (7) business days. The Custodian asserts that the requested letter of resignation contains confidential information relating to an ongoing affirmative action case in the school district. The Custodian contends that he clearly informed the Complainant that said redactions were made for this reason and that the Complainant's claim that the Custodian failed to provide a specific basis for the redactions is false.

July 7, 2007 OPRA request:

The Custodian certifies that he provided access to a redacted copy of a March 15, 2007 invoice on July 17, 2007. The Custodian asserts that issues not related to the Complainant's request regarding confidential special education cases were redacted. The Custodian asserts that all records responsive were provided to the Complainant in a timely manner and that the redacted information is not responsive to the Complainant's request.

¹⁷ The Custodian also attached an OPRA request which is not at issue of this complaint.

¹⁸ The Custodian provides two (2) e-mails from the Complainant which acknowledges that the Custodian's responses were received.

July 16, 2007 OPRA request:

The Custodian certifies that he responded in writing to this OPRA request on July 24, 2007 providing access to the requested June 11, 2007 executive session meeting minutes with redactions. The Custodian states that he advised the Complainant that the redacted information was related to personnel and negotiation matters.

The Custodian asserts that the redacted portion of the meeting minutes denoted “First Private Session” involves evaluations of the performance of district principals. The Custodian asserts that the redacted portion of the meeting minutes denoted “Second Private Session” involves a student issue, an affirmative action case and negotiation strategy for ongoing contract talks with the administrators’ union. The Custodian contends that the information was properly redacted pursuant to OPRA.

August 17, 2007 OPRA request:

The Custodian states that the Complainant submitted his OPRA request after the BOE had closed on August 17, 2007. The Custodian states that Ms. Karasewicz responded on August 20, 2007, stating that, per Mr. Gross, copies of the requested invoices cannot be provided to the Complainant but that the invoices may be reviewed at the Business Office.

The Custodian asserts that the requested invoices and accompanying vouchers were stapled to purchase orders in preparation for payment upon approval at a Board Finance committee meeting. The Custodian contends that fifty-eight (58) checks were prepared for approval at a Board Finance meeting the night of August 20, 2007.¹⁹ The Custodian asserts that it is imperative that the requested invoices and vouchers be in order and in one piece so as to expedite the approval process. The Custodian contends that separating, scanning and e-mailing the requested records to the Complainant on the day of the meeting was not possible, but that the Complainant was advised that he may review the records at the Business Office.

The Custodian argues that, given the circumstances, the BOE acted in good faith and provided the Complainant with a reasonable accommodation to gain access to the requested records given the time sensitivity of this request.

Finally, the Custodian contends that the Complainant has submitted thirty-four (34) OPRA requests for numerous documents, accompanied by over 225 e-mails regarding those requests, since the beginning of the year. The Custodian asserts that he has responded completely and in a timely manner. The Custodian asserts that, as evidenced in the SOI, the Complainant is prone to errors and omissions related to his OPRA requests.

¹⁹ The Complainant’s August 17, 2007 OPRA request was received on August 20, 2007; the same date as the Board Finance Meeting.
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June 3, 2009

E-mail from the GRC to the Custodian. The GRC states that the Complainant claims in the Denial of Access Complaint that the redacted invoices dated March 15, 2007 responsive to his July 7, 2007 OPRA request were provided on July 27, 2007. Additionally, the GRC states that the relevant OPRA request submitted as part of the SOI is dated October 16, 2007. The GRC states that one (1) e-mail from the Complainant to the Custodian dated July 7, 2007 and one (1) e-mail from the Custodian to the Complainant on July 17, 2007 attached as part of the SOI conflict with the evidence of record. The GRC requests that the Custodian certify to the following:

1. The actual date that the Complainant submitted his July 7, 2007 OPRA request and the date received.
2. The date the Custodian responded to the Complainant's OPRA request and provided the redacted invoices dated March 15, 2007.

The GRC requests that the Custodian provide the legal certification by close of business on June 5, 2009.

June 4, 2009

Legal Certification from the Custodian to the GRC with the following attachments:

- E-mail from the Complainant to the Custodian dated July 7, 2007, attaching an OPRA request for the records relevant to the Complainant's July 7, 2007 request.
- Complainant's OPRA request for the records relevant to the Complainant's July 7, 2007 request.²⁰
- E-mail from the Custodian to the Complainant dated July 16, 2007.
- E-mail from the Custodian to the Complainant dated July 17, 2007 attaching invoices responsive to the Complainant's July 7, 2007 OPRA request.

The Custodian certifies that the Complainant e-mailed an OPRA request dated July 16, 2007 to the Custodian on July 7, 2007. The Custodian certifies that he did not receive the Complainant's OPRA request until he returned from a leadership conference in Wisconsin on July 16, 2007, at which time he notified the Complainant that the OPRA request had been received.

The Custodian certifies that he responded in writing to the Complainant on July 17, 2007, providing the redacted invoices responsive via e-mail.

Analysis

Whether the Custodian unlawfully denied access to the records responsive to the Complainant's June 5, 2007 and August 17, 2007 OPRA requests?

OPRA provides that:

²⁰ The Complainant's OPRA request, though submitted on July 7, 2007, was dated July 16, 2007. Howard Kupferman v. Long Hill Township Board of Education (Morris), 2007-213 – Findings and Recommendations of the Executive Director

“...government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, *with certain exceptions...*” (Emphasis added.) N.J.S.A. 47:1A-1.

Additionally, OPRA defines a government record as:

“... any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof, that has been *made, maintained or kept on file ... or that has been received* in the course of his or its official business ...” (Emphasis added.) N.J.S.A. 47:1A-1.1.

OPRA also provides that:

“[i]f the 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. The custodian shall sign and date the form and provide the requestor with a copy thereof ...” N.J.S.A. 47:1A-5.g.

Further, OPRA provides that:

“[u]nless a shorter time period is otherwise provided by statute, regulation, or executive order, a custodian of a government record shall grant access ... or deny a request for access ... as soon as possible, but *not later than seven business days after receiving the request ...* In the event a custodian fails to respond within seven business days after receiving a request, *the failure to respond shall be deemed a denial of the request ...*” (Emphasis added.) N.J.S.A. 47:1A-5.i.

OPRA states that:

“*[i]mmediate* access ordinarily shall be granted to budgets, bills, *vouchers*, contracts, including collective negotiations agreements and individual employment contracts, and public employee salary and overtime information.” (Emphasis added.) N.J.S.A. 47:1A-5.e.

OPRA places the onus on the Custodian to prove that a denial of access is lawful. Specifically, OPRA states:

“...[t]he public agency shall have the burden of proving that the denial of access is authorized by law...” N.J.S.A. 47:1A-6.

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.

June 5, 2007 OPRA request:

Counsel argues in the Denial of Access Complaint that the Custodian failed to respond to the Complainant's request; however, the Custodian certified in the SOI that he responded on the same day as receipt of the Complainant's request, stating that no records responsive exist and provided credible evidence to support his certification.

In Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005), the Complainant sought telephone billing records showing a call made to him from the New Jersey Department of Education. The Custodian responded stating that there was no record of any telephone calls made to the Complainant. The Custodian subsequently certified that no records responsive to the Complainant's request existed. The GRC determined that although the Custodian failed to respond to the OPRA request in a timely manner, the Custodian did not unlawfully deny access to the requested records because the Custodian certified that no records responsive to the request existed.

In this complaint, the Custodian responded to the Complainant's June 5, 2007 OPRA request on the same business day as receipt of the Complainant's request, stating that no records responsive to the Complainant's OPRA request exist, the Custodian subsequently certified in the SOI that no records which are responsive to the request exist and there is no credible evidence in the record to refute the Custodian's certification. Therefore, the Custodian did not unlawfully deny access to the requested records pursuant to Pusterhofer, supra.²¹

August 17, 2007 OPRA request:

Counsel states that the Complainant was offered inspection of the requested invoices instead of copies thereof, as was requested. Counsel argues that the BOE failed to provide a specific lawful basis for denying access to copies of the requested invoices, which are classified as records to which immediate access must be provided pursuant to N.J.S.A. 47:1A-5.e.

Conversely, the Custodian argues that the requested invoices were in use on the day of the request. Specifically, the Custodian certifies in the SOI that said invoices were attached to purchase orders and vouchers scheduled for approval at a Board Finance meeting the night of August 20, 2007 and that it was not possible to detach the requested records from each of fifty-eight (58) checks to be approved. The Custodian contends that the BOE acted in good faith given the time constraints.

²¹ It should be noted that although there was a technical violation of OPRA regarding a timely response in Pusterhofer, supra, ultimately, no records responsive existed and there was no credible evidence to refute the Custodian's certification.

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In Shain v. Ocean County Board of Taxation (Ocean), GRC Complaint No. 2007-159 (June 2008), the Custodian responded to the Complainant's request for tax records, stating that the records would be available after July 9, 2007. The Custodian subsequently certified in the SOI that the records requested were in use by the Board of Taxation for hearing and determination of appeal from April 2, 2007 to July 1, 2007, but that the records remain available for inspection and/or copying at the Complainant's convenience. The Custodian further asserted that attempting to provide access to the requested records sooner than July 9, 2007 would have created a substantial disruption of agency operations pursuant to N.J.S.A. 47:1A-5.g.

Although the GRC deemed the Complainant's OPRA request to be invalid, the GRC did note that:

"...the Custodian's response to provide records when they were available due to the disruption to agency operations that would ensue if the records were provided before July 9, 2007 goes beyond what is required under the law."

In the instant complaint, the BOE provided the Complainant with the opportunity to inspect records on the same day as receipt of the Complainant's request because the requested invoices were part of fifty-eight (58) check packets that needed to be reviewed for approval by the Finance Board on the same day. The circumstances surrounding the records requested in this complaint are similar to those facts in Shain, supra, because providing access to copies of the requested invoices would have required the Custodian to detach all records responsive from the fifty-eight (58) checks, make copies and reattach the requested documents to the appropriate checks prior to the Finance Board reviewing them the same day.

Therefore, pursuant to Shain, supra, the Custodian did not unlawfully deny access to copies of the invoices requested in the Complainant's August 15, 2007 OPRA request because the invoices were in use by the BOE at the time of the Complainant's request.

Whether the Custodian's redactions are appropriate pursuant to OPRA?

In the instant complaint, the Custodian made redactions to the resignation letter dated June 14, 2007 which was responsive to the Complainant's June 18, 2007 OPRA request, the invoice dated March 15, 2007 which was responsive to the Complainant's July 7, 2007 OPRA request, and executive session meeting minutes dated June 11, 2007 which were responsive to the Complainant's July 16, 2007 OPRA request. The Custodian asserted that the redactions were made for each record as follows:

- The redacted portions of the resignation letter dated June 14, 2007 pertained to an affirmative action complaint.
- The redacted portions of the invoice dated March 15, 2007 pertained to confidential special education cases.
- The redacted portions of the executive session meeting minutes dated June 11, 2007 pertained to a student issue, affirmative action complaint and negotiations.

In Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005), the Complainant appealed a final decision of the GRC²² in which the GRC dismissed the complaint by accepting the Custodian's legal conclusion for the denial of access without further review. The court stated 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.”

The court also stated that:

“[t]he statute 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-7f. This provision would be unnecessary if the Legislature did not intend to permit *in camera* review.”

Further, the court stated that:

“[w]e 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-7f, which provides for closed meeting when necessary to avoid disclosure before resolution of a contested claim of exemption.”

Therefore, pursuant to Paff, supra, the GRC must conduct an *in camera* review of the resignation letter from Mr. DiBenedetto to Ms. Becker and the Custodian dated June 14, 2007, the Schwartz, Simon, Edelstein Celso & Kessler, LLP invoice dated March 15, 2007 and the June 11, 2007 executive session meeting minutes in order to determine the validity of the Custodian’s assertion that the redactions constitute information which is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1.

²² Paff v. NJ Department of Labor, Board of Review, GRC Complaint No. 2003-128 (October 2005). Howard Kupferman v. Long Hill Township Board of Education (Morris), 2007-213 – Findings and Recommendations of the Executive Director

Whether the Custodian's actions rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances?

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.

Whether the Complainant is a "prevailing party" pursuant to N.J.S.A. 47:1A-6 and entitled to reasonable attorney's fees?

The Council defers analysis of whether the Complainant is a prevailing party 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 responded to the Complainant's June 5, 2007 OPRA request on the same business day as receipt of the Complainant's request, stating that no records responsive to the Complainant's OPRA request exist, the Custodian subsequently certified in the Statement of Information that no records which are responsive to the request exist and there is no credible evidence in the record to refute the Custodian's certification. Therefore, the Custodian did not unlawfully deny access to the requested records pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).
2. Pursuant to Shain v. Ocean County Board of Taxation (Ocean), GRC Complaint No. 2007-159 (June 2008), the Custodian did not unlawfully deny access to copies of the invoices requested in the Complainant's August 15, 2007 OPRA request because the invoices were in use by the Long Hill Township Board of Education at the time of the Complainant's request.
3. Pursuant to Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005), the GRC must conduct an *in camera* review of the resignation letter from Mr. DiBenedetto to Ms. Becker and the Custodian dated June 14, 2007, the Schwartz, Simon, Edelstein Celso & Kessler, LLP invoice dated March 15, 2007 and the June 11, 2007 executive session meeting minutes in order to determine the validity of the Custodian's assertion that the redactions constitute information which is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1.
4. **The Custodian must deliver²³ to the Council in a sealed envelope nine (9) copies of the requested unredacted documents (see No. 3 above), a**

²³ The *in camera* documents may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as they arrive at the GRC office by the deadline.
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document or redaction index²⁴, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4²⁵, that the documents provided are the documents 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.
6. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Prepared By: Frank F. Caruso
Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

August 4, 2009

²⁴ The document or redaction index should identify the document and/or each redaction asserted and the lawful basis for the denial.

²⁵ "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."