



**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*

**FINAL DECISION**

**December 22, 2009 Government Records Council Meeting**

Beverly E. Jones  
Complainant

Complaint No. 2007-282

v.

Trenton Board of Education (Mercer)  
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 this complaint should be dismissed because both parties failed to appear before the Office of Administrative Law at a scheduled proceeding on November 10, 2009 and neither party provided the GRC with an explanation of their failure to appear in accordance with *N.J.A.C. 1:1-18.4* of the Administrative Procedures Code.

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 22<sup>nd</sup> 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: January 5, 2010**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

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

**Beverly E. Jones<sup>1</sup>  
Complainant**

**GRC Complaint No. 2007-282**

v.

**Trenton Board of Education (Mercer)<sup>2</sup>  
Custodian of Records**

**Record Relevant to Complaint:** Copy of Trenton School District Internal Investigation Report for the Sherman Avenue Campus 2004-2005 School Year completed by Special Counsel and outside investigator(s) hired by the Trenton Board of Education (“TBOE”).

**Request Made:** November 2, 2007

**Response Made:** November 9, 2007

**Custodian:** Patricia Rhoden

**GRC Complaint Filed:** November 13, 2007

**Background**

**June 23, 2009**

Government Records Council’s (“Council”) Interim Order. At its June 23, 2009 public meeting, the Council considered the June 16, 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 not complied with the Council’s May 28, 2008 Interim Order because the Custodian failed to provide to the Council all of the records set forth in Paragraph 3 of the Interim Order within five (5) business days of receiving the Council’s Interim Order; to wit, the Custodian failed to submit the records and documentation to the GRC in a timely manner.
2. Based on the inadequate evidence presented in this matter; the GRC is unable to determine whether or not the Custodian unlawfully denied access to the records responsive to the Complainant’s request. Therefore, this complaint should be referred to the Office of Administrative Law for a full hearing, including an *in camera* examination of the record, to resolve the facts and to determine whether the custodian unlawfully denied access to the record as attorney-client privileged material, and if so, for a further determination of

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<sup>1</sup> No legal representation listed on record.

<sup>2</sup> Represented by Sharon Larmore, Esq., (Trenton, NJ).

whether the attorney-client privilege was waived, and further, if the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.

**June 26, 2009**

Council's Interim Order distributed to the parties.

**July 7, 2009**

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

**November 16, 2009**

Complaint transmitted back to the GRC on the basis that both parties failed to appear at a scheduled proceeding on November 10, 2009.<sup>3</sup>

**Analysis**

Because both parties failed to appear before OAL at a scheduled proceeding on November 10, 2009 and neither party provided the GRC with an explanation of their failure to appear in accordance with *N.J.A.C.* 1:1-18.4 of the Administrative Procedures Code, no analysis is required.

**Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that this complaint should be dismissed because both parties failed to appear before the Office of Administrative Law at a scheduled proceeding on November 10, 2009 and neither party provided the GRC with an explanation of their failure to appear in accordance with *N.J.A.C.* 1:1-18.4 of the Administrative Procedures Code.

Prepared By: Frank F. Caruso  
Case Manager

Approved By: Catherine Starghill, Esq.  
Executive Director

December 9, 2009

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<sup>3</sup>The Notice of Return for failure to appear requires the parties to submit excuses for said failure to appear and simultaneously copy all parties within thirteen (13) days of notice. *N.J.A.C.* 1:1-18.4 provides for a thirteen (13) day time frame in which parties may submit Exceptions to an Administrative Law Judge's Initial Decision. Neither party in the instant complaint submitted an excuse for their failure to appear within the thirteen (13) days allotted.



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

**JON S. CORZINE**  
*Governor*

**JOSEPH V. DORIA, JR.**  
*Commissioner*

**INTERIM ORDER**

**June 23, 2009 Government Records Council Meeting**

Beverly E. Jones  
Complainant

Complaint No. 2007-282

v.

Trenton Board of Education (Mercer)  
Custodian of Record

At the June 23, 2009 public meeting, the Government Records Council (“Council”) considered the June 16, 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. The Custodian has not complied with the Council’s May 28, 2008 Interim Order because the Custodian failed to provide to the Council all of the records set forth in Paragraph 3 of the Interim Order within five (5) business days of receiving the Council’s Interim Order; to wit, the Custodian failed to submit the records and documentation to the GRC in a timely manner.
2. Based on the inadequate evidence presented in this matter; the GRC is unable to determine whether or not the Custodian unlawfully denied access to the records responsive to the Complainant’s request. Therefore, this complaint should be referred to the Office of Administrative Law for a full hearing, including an *in camera* examination of the record, to resolve the facts and to determine whether the custodian unlawfully denied access to the record as attorney-client privileged material, and if so, for a further determination of whether the attorney-client privilege was waived, and further, if the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.



Interim Order Rendered by the  
Government Records Council  
On The 23<sup>rd</sup> Day of June, 2009

Robin Berg Tabakin, Chair  
Government Records Council

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

Kathryn Forsyth  
Government Records Council

**Decision Distribution Date: June 25, 2009**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director  
June 23, 2009 Council Meeting**

**Beverly E. Jones<sup>1</sup>  
Complainant**

**GRC Complaint No. 2007-282**

v.

**Trenton Board of Education (Mercer)<sup>2</sup>  
Custodian of Records**

**Record Relevant to Complaint:** Copy of Trenton School District Internal Investigation Report for the Sherman Avenue Campus 2004-2005 School Year completed by Special Counsel and outside investigator(s) hired by the Trenton Board of Education (“TBOE”).

**Request Made:** November 2, 2007

**Response Made:** November 9, 2007

**Custodian:** Patricia Rhoden

**GRC Complaint Filed:** November 13, 2007

**Background**

**May 28, 2008**

Government Records Council’s Interim Order. At the May 28, 2008 public meeting, the Government Records Council (“Council”) considered the May 21, 2008 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. Because the report was created by special counsel for the TBOE in the context of anticipated and pending litigation, the report is subject to attorney-client privilege and is therefore exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1.
2. The GRC must conduct an *in camera* of the requested report in order to decide whether the attorney-client privilege has been waived. See United Jersey Bank v. Wolosoff, 196 N.J. Super. 553 (App. Div. 1984).
3. **The Custodian must deliver<sup>3</sup> to the Council in a sealed envelope nine (9) copies of the requested unredacted document (see No. 2 above), a**

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<sup>1</sup> No legal representation listed on record.

<sup>2</sup> Represented by Sharon Larmore, Esq., (Trenton, NJ).

<sup>3</sup> 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.

document or redaction index<sup>4</sup>, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4, that the document provided is the document 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.

4. The Custodian shall comply with item No. 3 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director.
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.

#### **June 4, 2008**

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

#### **June 18, 2008**

Letter from the Custodian's Counsel to the GRC in response to the Council's Interim Order. The Custodian's Counsel forwarded to the GRC nine (9) copies each of the records relevant to the complaint in unredacted form and a legal certification that the documents provided are the documents requested by the Council for the *in camera* inspection as required by the Order. A document/redaction index was deemed to be unnecessary by the Custodian's Counsel, therefore one was not provided to the GRC.

#### **July 9, 2008**

Letter from the Custodian's Counsel to the GRC. The Custodian's Counsel forwards to the GRC a Substitution of Attorney dated June 30, 2008. Sharon Larmore, Esq., was substituted for Harold W. George, P.C.

#### **July 17, 2008**

E-mail from the GRC to the Custodian. The Custodian was advised by the GRC that page thirty-nine (39) of forty (40) bound pages in the record submitted for *in camera* examination was missing. The GRC requests that the Custodian send a certification averring that page 39 does not exist, if that is the case. If page 39 does exist, the GRC requests the Custodian submit it to the GRC along with a certification that the document provided is the document requested by the Council for the *in camera* inspection as required by the Order.

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<sup>4</sup> The document or redaction index should identify the document and/or each redaction asserted and the lawful basis for the denial.  
Beverly E. Jones v. Trenton Board of Education (Mercer), 2007-282 – Supplemental Findings and Recommendations of the Executive Director



**July 18, 2008**

Facsimile transmission from the Custodian's Counsel. Counsel forwarded the missing page of the *in camera* submission but failed to forward a certification that the document provided is the document requested by the Council for the *in camera* inspection.

**October 29, 2008**

Directive from the Council. The Council directs the GRC to ask the Custodian which person or persons commissioned the record relevant to the complaint and for what purpose the record was prepared.

**November 17, 2008**

Letter from the GRC to Custodian's Counsel. The GRC informs the Custodian's Counsel that the Council needs to know which person or persons commissioned the record relevant to the complaint and for what purpose the record was prepared.

**January 28, 2009**

Letter from the GRC to Custodian's Counsel. The GRC restates the inquiry contained in the GRC's letter to Counsel dated November 17, 2008 and informs Counsel the GRC never received a reply.

**February 2, 2009**

Telephone call from the Custodian's Counsel to the GRC. Counsel informs the GRC that the TBOE appointed outside Special Counsel Alberto Rivas to prepare the record relevant to the complaint to determine what had occurred.<sup>5</sup>

### Analysis

**Whether the Custodian complied with the Council's May 28, 2008 Interim Order?**

Paragraph 3 of the Council's May 28, 2008 Interim Order directed the Custodian to deliver certain records and documentation to the Council within five (5) business days from receipt of said Interim Order. The Interim Order was received by the Custodian on or before June 5, 2008, therefore the Custodian was required to comply with the terms of the Interim Order no later than June 12, 2008. The Custodian submitted to the GRC all required records and documentation on June 18, 2008.

Accordingly, the Custodian failed to comply with the Council's May 28, 2008 Interim Order because the Custodian failed to submit the records and documentation to the GRC in a timely manner.

**Whether the attorney-client privilege found to apply to the record relevant to the complaint has been waived?**

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<sup>5</sup> To quote Custodian's Counsel, the report was prepared: "to conduct an investigation to determine what had occurred."

The Complainant filed an OPRA request dated November 2, 2007, wherein she requested the record relevant to this Complaint. The Custodian's Counsel responded to the request on November 9, 2007, and denied the Complainant access to said record on the grounds that it constituted attorney-client privileged material. The Complainant filed a Denial of Access Complaint dated November 13, 2007, claiming she was unlawfully denied access to the record. The Custodian filed a Statement of Information dated December 13, 2007, wherein the Custodian asserted that the record was created in the context of anticipated and pending litigation and was; therefore, exempt from disclosure as attorney-client privileged material. The Complainant filed a response dated December 27, 2007, alleging that a press release by TBOE summarizing the content of the report was published in the Trenton Times and; therefore, any attorney-client privilege was waived.

The Council (relying upon the Custodian's certification) determined that the requested record was created by special counsel for the TBOE in the context of anticipated and pending litigation. For this reason, the Council by Interim Order rendered on May 28, 2008, found that the record was subject to the attorney-client privilege and was therefore exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1. The Council further ordered that an *in camera* examination must be conducted to determine if the attorney-client privilege had been waived. The Council ordered the Custodian to deliver the record relevant to the complaint for the *in camera* examination since the Council was already in possession of the purported press release which the Complainant alleged waived the attorney-client privilege. An initial review of the materials submitted revealed that there is an issue as to whether the report is attorney-client privileged, as well as whether the press release waived such privilege.

Although there are documents in the file which purport to be a press release summarizing the requested record and a copy of an online news article referencing said press release submitted by the Custodian and the Complainant, respectively; neither document is a certified true copy. Both documents, therefore, are of questionable evidential value.

Based on the inadequate evidence presented in this matter, the GRC is unable to determine whether or not the Custodian unlawfully denied access to the record responsive to the Complainant's request. Therefore, this complaint should be referred to the Office of Administrative Law for a full hearing, including an *in camera* examination of the record, to resolve the facts and to determine whether the custodian unlawfully denied access to the record as attorney-client privileged material, and if so, for a further determination of whether the attorney-client privilege was waived, and further, if the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. The Custodian has not complied with the Council's May 28, 2008 Interim Order because the Custodian failed to provide to the Council all of the records

set forth in Paragraph 3 of the Interim Order within five (5) business days of receiving the Council's Interim Order; to wit, the Custodian failed to submit the records and documentation to the GRC in a timely manner.

2. Based on the inadequate evidence presented in this matter; the GRC is unable to determine whether or not the Custodian unlawfully denied access to the records responsive to the Complainant's request. Therefore, this complaint should be referred to the Office of Administrative Law for a full hearing, including an *in camera* examination of the record, to resolve the facts and to determine whether the custodian unlawfully denied access to the record as attorney-client privileged material, and if so, for a further determination of whether the attorney-client privilege was waived, and further, if the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.

Prepared By: John E. Stewart  
Case Manager/*In Camera* Attorney

Approved By: Catherine Starghill, Esq.  
Executive Director

June 16, 2009



State of New Jersey  
GOVERNMENT RECORDS COUNCIL

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ROBIN BERG TABAKIN, Chair  
COMMISSIONER JOSEPH V. DORIA, JR.  
COMMISSIONER LUCILLE DAVY  
DAVID FLEISHER  
CATHERINE STARGHILL Esq., Executive Director

INTERIM ORDER

May 28, 2008 Government Records Council Meeting

Beverly Jones  
Complainant

Complaint No. 2007-282

v.

Trenton Board of Education (Mercer)  
Custodian of Record

At the May 28, 2008 public meeting, the Government Records Council (“Council”) considered the May 21, 2008 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. By a majority vote, the Council adopted the amended findings and recommendations. The Council, therefore, finds that:

1. Because the report was created by special counsel for the TBOE in the context of anticipated and pending litigation, the report is subject to attorney-client privilege and is therefore exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1.
2. The GRC must conduct an *in camera* of the requested report in order to decide whether the attorney-client privilege has been waived. See United Jersey Bank v. Wolosoff, 196 N.J. Super. 553 (App. Div. 1984).
3. **The Custodian must deliver<sup>1</sup> to the Council in a sealed envelope nine (9) copies of the requested unredacted document (see No. 2 above), a document or redaction index<sup>2</sup>, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4, that the document provided is the document 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.**
4. **The Custodian shall comply with item No. 3 above within five (5) business days from receipt of the Council’s Interim Order with appropriate**

<sup>1</sup> 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.

<sup>2</sup> The document or redaction index should identify the document and/or each redaction asserted and the lawful basis for the denial.



**redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director.**

5. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Interim Order Rendered by the  
Government Records Council  
On The 28<sup>th</sup> Day of May, 2008

Robin Berg Tabakin, Chairman  
Government Records Council

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

David Fleisher, Secretary  
Government Records Council

**Decision Distribution Date: June 4, 2008**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
May 28, 2008 Council Meeting**

**Beverly E. Jones<sup>1</sup>  
Complainant**

**GRC Complaint No. 2007-282**

v.

**Trenton Board of Education<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:** Copy of Sherman Avenue Special Counsel Investigation Report involving the falsification of transcripts and records reporting completed by outside investigators hired by the Trenton Board of Education.

**Request Made:** November 2, 2007

**Response Made:** November 9, 2007

**Custodian:** Patricia Rhoden

**GRC Complaint Filed:** November 13, 2007

**Background**

**November 2, 2007**

Complainant's Open Public Records Act ("OPRA") request. The Complainant requests the records relevant to this complaint listed above on an official OPRA request form.

**November 9, 2007**

Custodian Counsel's Response to the OPRA request. The Custodian's Counsel responds in writing to the Complainant's OPRA request on the fourth (4th) business day following receipt of such request. The Custodian's Counsel states that access to the requested record is denied because the report was prepared by special counsel retained by the Board, therefore, the requested record is not subject to disclosure as attorney-client privileged material pursuant to N.J.S.A. 47:1A-1.1. The Custodian's Counsel further states that he will discuss this request with the Board on November 13, 2007 to find out if the Board would still release the requested record even though the attorney-client privilege applies to this record.

**November 13, 2007**

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

- Complainant's OPRA request dated November 2, 2007.

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<sup>1</sup> No legal representation listed on record.

<sup>2</sup> Represented by Thomas Sumners, Esq., of Sumners George, P.C. (Trenton, NJ).

The Complainant states that she filed an OPRA request with the Trenton Board of Education (“TBOE”) on November 2, 2007. The Complainant states that the Custodian’s Counsel responded on November 9, 2007 stating that the Complainant’s request was denied on the basis that the requested record is protected by attorney-client privilege.

The Complainant contends that she disagrees with the TBOE’s response because beneficiaries of this report are the taxpayers. The Complainant avers that the report was financed with \$30,158 in taxpayer funds. The Complainant further avers that she was a part of the investigation, spent four (4) hours of time to provide testimony and was the person who filed the complaint of grade tampering and other illegalities with the New Jersey Department of Education (“NJDOE”).

The Complainant did not agree to mediate this complaint.

**December 3, 2007**

Request for the Statement of Information sent to the Custodian.

**December 12, 2007**

E-mail from the Custodian’s Counsel to the GRC. The Custodian requests an extension of the deadline to submit the Statement of Information.

**December 13, 2007**

E-mail from GRC to the Custodian. The GRC grants the Custodian an extension until December 17, 2007 to file the Statement of Information.

**December 13, 2007**

Custodian’s Statement of Information (“SOI”) with the following attachments:

- Complainant’s OPRA request dated November 2, 2007.
- Letter from the Custodian’s Counsel to the Complainant dated November 9, 2007.
- Trenton Board of Education Resolution hiring special counsel dated May 16, 2007.

The Custodian’s Counsel states that the Complainant’s November 2, 2007 OPRA request is for the report created by special counsel, an eighty-five (85) page record issued on October 30, 2007. The Custodian’s Counsel states that he responded in writing to the Complainant on November 9, 2007, advising the Complainant that the report was exempt from disclosure pursuant to N.J.S.A.47:1A-1.1. because the report is subject to attorney-client privilege.

The Custodian’s Counsel asserts that the requested record was created in the context of anticipated and pending litigation. The Custodian’s Counsel further avers that the report was necessary to advise the TBOE how to deal with prospective disciplinary action against employees, lawsuits filed by the Complainant, as well as how to defend against tort claims filed by former students of Sherman Avenue School. The Custodian’s Counsel asserts that as a result of pending legal action, special counsel was retained to

provide services in the context of attorney-client privilege, thereby rendering the requested record exempt from disclosure under OPRA.

### **December 27, 2007**

The Complainant's Response to the Custodian's SOI. The Complainant asserts that she believes that once a press release of a summary of the report was released to the Trenton Times newspaper and to others in response to an OPRA request, the requested report became open to the public. The Complainant further asserts that when a summary of the report was released, that report should no longer be deemed a guarded record. The Complainant also asserts that if the TBOE does use the requested report to defend against tort claims or lawsuits, as outlined by the Custodian's Counsel, then the report will be released during the course of litigation anyway.

The Complainant further asserts that the TBOE President indicated that the requested report would be released to the public upon completion of the investigation. The Complainant contends that she was not even provided with a summary of the report, as others had received when requesting the report. The Complainant finally contends that this report was initiated to clarify the findings of a compliance report conducted by NJDOE in 2004 through 2005 which was released to the public.

### **Analysis**

#### **Whether the Custodian unlawfully denied access to the requested Special Counsel Investigation Report?**

OPRA provides that:

"...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 ... [a] government record *shall not include* the following information which is *deemed to be confidential ...*: any record within the *attorney-client privilege.*" (Emphasis added.) N.J.S.A. 47:1A-1.1.

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.

In this case, the Complainant asserts that the requested report was paid for by public tax dollars and that because a summary of the report was released to the Trenton Times newspaper and other requesters, the report should be deemed subject to disclosure. Conversely, the Custodian asserts the requested report is not subject to disclosure pursuant to N.J.S.A. 47:1A-1.1. as an attorney-client privileged matter.

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).

Additionally, in Mulero v. Town of Morristown, GRC Complaint No. 2005-57 (September 2005), the Complainant was denied access to a report prepared by special counsel in response to an investigation of a councilwoman. The Custodian in that case asserted that the record was created as a result of the town hiring special counsel to render advice on how the town should proceed. The GRC held that “the requested record is not disclosable, because it is attorney-client privileged and is exempt from disclosure.” The Council cited that the Custodian and Counsel in that case stated that:

1. The requested record is from independent counsel hire to investigate and report on a specific matter.
2. The report was created for the purpose of rendering advice as to how the Council should proceed.
3. The report was given to the town’s governing body setting forth the independent counsel’s conclusions, recommendations and advice regarding the appropriate course of action for the town to follow.

The facts of Mulero closely relate to the facts of the complaint currently before the GRC. The Custodian’s Counsel in this case certified that a special counsel was retained to create a report in the context of anticipated and pending litigation. The Custodian’s Counsel further certifies that the TBOE was using this report as advice for dealing with prospective disciplinary action against employees, lawsuits filed by the Complainant as well as defending against tort claims filed by former students.

However, the Complainant asserts that the TBOE has waived its right to assert that the requested report is exempt from disclosure under OPRA because the Board released a summary of the report to a local newspaper. The GRC has obtained this summary from the Custodian's Counsel, but is unable to make a determination as to whether the summary contains a reasonable amount of privileged information that would cause the TBOE to have waived the attorney-client privilege.

New Jersey Rule of Evidence 530 states in pertinent part that:

“[a] person waives his right or privilege to refuse to disclose or to prevent another from disclosing a specified matter if he or any other person while the holder thereof has ... without coercion and with knowledge of his right or privilege, made disclosure of any part of the privileged matter or consented to such a disclosure made by anyone.” N.J.R.E. 530.

In United Jersey Bank v. Wolosoff, 196 N.J. Super. 553 (App. Div. 1984), United Jersey Bank had entered into a settlement agreement with Wolosoff, the defendant mortgagee, upon the default of a mortgage note. *Id.* at 558. United Jersey learned that Wolosoff's financial condition was greater than that represented and brought suit to rescind the settlement and to enforce the judgment, and brought a second suit against the law firm that represented Wolosoff for intentionally and fraudulently misrepresenting Wolosoff's financial condition. *Id.* During discovery, United Jersey's in-house counsel invoked the attorney-client privilege on all documents not pertinent to the issue of the bank's reasonable reliance on the defendant law firm's representations. *Id.* The trial court ordered the disclosure of all confidential communications and the court reversed. The Appellate Division ordered an *in camera* inspection of the in-house counsel's communications to determine whether the attorney-client privilege was applicable and, if so, whether it was waived because the communications bear upon the question of reasonable reliance. *Id.* at 568.

Therefore, the GRC must conduct an *in camera* of the requested report in order to decide whether the record is exempt from disclosure as attorney-client privileged. See United Jersey Bank v. Wolosoff, 196 N.J. Super. 553 (App. Div. 1984).

**Whether the Custodian's delay in access to the requested records rises 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.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. Because the report was created by special counsel for the TBOE in the context of anticipated and pending litigation, the report is subject to attorney-client

privilege and is therefore exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1.

2. The GRC must conduct an *in camera* of the requested report in order to decide whether the attorney-client privilege has been waived. See United Jersey Bank v. Wolosoff, 196 N.J. Super. 553 (App. Div. 1984).
3. **The Custodian must deliver<sup>3</sup> to the Council in a sealed envelope nine (9) copies of the requested unredacted document (see No. 2 above), a document or redaction index<sup>4</sup>, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4, that the document provided is the document 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.**
4. **The Custodian shall comply with item No. 3 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director.**
5. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Prepared By:

Frank F. Caruso  
Case Manager

Approved By:

Catherine Starghill, Esq.  
Executive Director

May 21, 2008

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<sup>3</sup> 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.

<sup>4</sup> The document or redaction index should identify the document and/or each redaction asserted and the lawful basis for the denial.