



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

RICHARD E. CONSTABLE, III
Acting Commissioner

FINAL DECISION

February 28, 2012 Government Records Council Meeting

Joseph R. Armenti
Complainant

Complaint No. 2009-154

v.

Robbinsville Board of Education (Mercer)
Custodian of Record

At the February 28, 2012 public meeting, the Government Records Council (“Council”) considered the February 21, 2012 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 evidence of record indicates that the Custodian timely complied with the Council’s January 31, 2012 Interim Order by providing the records to the Complainant and the Custodian’s certified confirmation of compliance to the Executive Director within the deadline to comply with said Order.
2. Although the Custodian failed to bear his burden under N.J.S.A. 47:1A-6 of proving a lawful denial of access to the December 2, 2008 communication from Nicole Rossi to Molly Avery and the December 17, 2008 communication from Nicole Rossi to Molly Avery, the Custodian lawfully denied access to the remaining records responsive to request Item No. 4 of the Complainant’s April 8, 2009 OPRA request and request Items No. 1 and 2 of the Complainant’s April 24, 2009 OPRA request. Moreover, the Custodian timely complied with the Council’s May 24, 2011 Interim Order by providing records for an *in camera* review and further complied with the Council’s January 31, 2012 Interim Order by providing the records to the Complainant and the Custodian’s certified confirmation of compliance to the Executive Director within the deadline to comply with said Order. Additionally, the evidence of record does not indicate that the Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, 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.

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 28th Day of February, 2012

Robin Berg Tabakin, Esq., Chair
Government Records Council

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

Denise Parkinson Vetti, Esq., Secretary
Government Records Council

Decision Distribution Date: March 5, 2012

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
February 28, 2012 Council Meeting**

**Joseph R. Armenti¹
Complainant**

GRC Complaint No. 2009-154

v.

**Robbinsville Board of Education (Mercer)²
Custodian of Records**

Records Relevant to Complaint:

April 8, 2009 request:

1. E-mails and all attachments thereto sent from Dr. John J. Szabo to all administrators, school board members, school board staff, employees and any news media from September 23, 2008 through December 31, 2008 containing in the subject or body of the e-mails the following key words: Armenti, GSA, GSE, Gay Straight Alliance, Garden State Equality, Goldstein, gay slur, gay, diversity, forum, Molly Avery, Margo Saltzman, Carol Watchler, Allison Sussman, Pethybridge, Sierkerka, Williams, Guiducci, Schulman, First Amendment, right.
2. Letters sent by Dr. John J. Szabo to all administrators, school board members, school staff, employees and news media from September 23, 2008 through December 31, 2008 containing the words: Armenti, GSA, GSE, Gay Straight Alliance, Garden State Equality, Goldstein, gay, slur, diversity, Avery, Sussman, Pethybridge, Williams, Siekerka, Guiducci, Schulman, First Amendment, right;
3. E-mails and letters sent by Dr. John J. Szabo to all news media from September 23, 2008 to December 31, 2008 containing the words Armenti, GSA, GSE, Gay Straight Alliance, Garden State Equality, Goldstein, gay, slur, diversity, Avery, Sussman, Pethybridge, Williams, Siekerka, Guiducci, Schulman, First Amendment, rights;
4. E-mails and letters sent from Molly Avery to Dr. John J. Szabo, all administrators, school board members and news media from September 23, 2009 to December 31, 2008 containing the words: Armenti, GSA, GSE, Gay Straight Alliance, Garden State Equality, Goldstein, gay, slur, First Amendment, right, diversity, Sussman, Pethybridge, Williams, Sierkerka, Guiducci, Schulman, Watchler.

April 24, 2009 request:

1. All e-mails and letters from Nicole Rossi to Molly Avery, Dr. Kathie Foster, school board members, school staff, school employees, Steven Goldstein, Carmen Cusido and any news media from September 23, 2008 to December 31, 2008 containing the following key words in the Subject or body of the e-mails, and all attachments

¹ No legal representation listed on record.

² Represented by Thomas Segreto, Esq., Scarinci & Hollenbeck (Lyndhurst, NJ).

thereto: Armenti, GSA, GSE, Gay Straight Alliance, Garden State Equality, Steven Goldstein, gay slur, gay, diversity, homophobe, hate, forum, Margo, Saltzman, Watchler, Allison, Sussman, First Amendment, right, David Pethybridge, Michele Sierkerka, Carmen, Cusido, Trenton Times, Times of Trenton, Times, Allen Spear, Washington Blade, Out in New Jersey.net, Governor Jon Corzine, radio, station, 101.5;

2. All e-mails and letters from Molly Avery to Nicole Rossi, Dr. Kathie Foster, school board members, school staff, school employees, Steven Goldstein, Carmen Cusido and any news media from September 23, 2008 to December 31, 2008 containing the following key words in the Subject or the body of the e-mail, and all attachments thereto: Armenti, GSA, GSE, Gay Straight Alliance, Garden State Equality, Steven, Goldstein, gay slur, gay, diversity, homophobe, hate, forum, Margo, Saltzman, Watchler, Allison, Sussman, First Amendment, right, David Pethybridge, Michele Siekerka, Carmen, Cusido, Trenton Times, Times of Trenton, Times, Allen Spear, Washington Blade, Out in New Jersey.net, Governor, Jon, Corzine, radio, station, 101.5.

Request Made: April 8, 2009; April 24, 2009

Response Made: May 4, 2009

Custodian: Robert DeVita³

GRC Complaint Filed: May 8, 2009⁴

Background

January 31, 2012

Government Records Council's Interim Order. At the January 31, 2012 public meeting, the Government Records Council ("Council") considered the January 24, 2012 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 has complied with the Council's May 24, 2011 Interim Order by providing the Council with all records set forth in Paragraph 2 of the 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.**
3. 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.

³ The original Custodian of Record is Louise B. Davis, who retired in December, 2009.

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

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> Examination⁵
September 25, 2008	Communication from Nicole Rossi to Molly Avery	Inter-agency or intra-agency advisory, consultative or deliberative material	<u>N.J.S.A.</u> 47:1A-1.1	Exempt from disclosure as advisory, consultative or deliberative material pursuant to <u>N.J.S.A.</u> 47:1A-1.1 because it contains draft material.
December 2, 2008	Communication from Nicole Rossi to Molly Avery	Inter-agency or intra-agency advisory, consultative or deliberative material	<u>N.J.S.A.</u> 47:1A-1.1	Disclosable in its entirety. Pursuant to the Custodian's legal certification dated December 21, 2011, subject was approved by the governing body on March 31, 2009 and therefore no longer constituted advisory, consultative or deliberative material pursuant to <u>N.J.S.A.</u> 47:1A-1.1.
December 17, 2008	Communication from Nicole Rossi to Molly	Inter-agency or intra-agency advisory,	<u>N.J.S.A.</u> 47:1A-1.1	Exempt from disclosure as advisory,

⁵ **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.

	Avery	consultative or deliberative material		consultative or deliberative material pursuant to <u>N.J.S.A. 47:1A-1.1</u> because it contains draft material.
December 17, 2008	Communication from Nicole Rossi to Molly Avery	Inter-agency or intra-agency advisory, consultative or deliberative material	<u>N.J.S.A. 47:1A-1.1</u>	Redact the four (4) lines following “Hi” as advisory, consultative and deliberative material pursuant to <u>N.J.S.A. 47:1A-1.1</u> . because it contains draft material. All other material is disclosable.

February 2, 2012

Council’s Interim Order (“Order”) distributed to the parties.

February 8, 2012

Facsimile transmission from the Custodian’s Council to the GRC, attaching the Custodian’s certification of compliance. The Custodian certifies that on February 8, 2012, he forwarded to the Complainant the records required to be disclosed pursuant to the Council’s January 31, 2012 Interim Order.

Analysis

Whether the Custodian complied with the Council’s January 31, 2012 Interim Order?

At its January 31, 2012 public meeting, the Council conducted an *in camera* examination on the records submitted for review and determined that the December 2, 2008 communication from Nicole Rossi to Molly Avery was disclosable in its entirety because the Custodian certified on December 21, 2011 that the Board of Education’s budget was approved by the governing body on March 31, 2009 and therefore the communication no longer constituted advisory, consultative or deliberative (“ACD”) material pursuant to N.J.S.A. 47:1A-1.1. The Council also examined the December 17, 2008 communication from Nicole Rossi to Molly Avery and determined that the record was disclosable with redactions. The Council therefore ordered the Custodian to provide such records to the Complainant within five (5) business days of receipt of the Council’s Interim Order or by February 9, 2012.

The Custodian’s Counsel certified to the GRC on February 8, 2012 that on the same date, he provided the subject records to the Complainant.

Therefore, the evidence of record indicates that the Custodian timely complied with the Council's January 31, 2012 Interim Order by providing the records to the Complainant and the Custodian's certified confirmation of compliance to the Executive Director within the deadline to comply with said Order.

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?

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.

In the matter before the Council, the Custodian failed to disclose the December 2, 2008 communication from Nicole Rossi to Molly Avery that no longer constituted ACD material at the time of the Complainant's request, and failed to disclose the December 17, 2008 communication from Nicole Rossi to Molly Avery with redactions as necessary. However, the Council determined that the Custodian lawfully denied access to the remaining records responsive to request Item No. 4 of the Complainant's April 8, 2009 OPRA request and request Items No. 1 and 2 of the Complainant's April 24, 2009 OPRA request. Moreover, request Items No. 1, 2 and 3 of the Complainant's April 8, 2009 request failed to identify by name the specific recipients of the e-mails and letters sought, failed to specify identifiable government records and would have required the Custodian to perform research that he is not required to do: such requests were therefore invalid under OPRA.

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 failed to bear his burden under N.J.S.A. 47:1A-6 of proving a lawful denial of access to the December 2, 2008 communication from Nicole Rossi to Molly Avery and the December 17, 2008 communication from Nicole Rossi to Molly Avery, the Custodian lawfully denied access to the remaining records responsive to request Item No. 4 of the Complainant's April 8, 2009 OPRA request and request Items No. 1 and 2 of the Complainant's April 24, 2009 OPRA request. Moreover, the Custodian timely complied with the Council's May 24, 2011 Interim Order by providing records for an *in camera* review and further complied with the Council's January 31, 2012 Interim Order by providing the records to the Complainant and the Custodian's certified confirmation of compliance to the Executive Director within the deadline to comply with said Order. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, 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.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The evidence of record indicates that the Custodian timely complied with the Council's January 31, 2012 Interim Order by providing the records to the Complainant and the Custodian's certified confirmation of compliance to the Executive Director within the deadline to comply with said Order.
2. Although the Custodian failed to bear his burden under N.J.S.A. 47:1A-6 of proving a lawful denial of access to the December 2, 2008 communication from Nicole Rossi to Molly Avery and the December 17, 2008 communication from Nicole Rossi to Molly Avery, the Custodian lawfully denied access to the remaining records responsive to request Item No. 4 of the Complainant's April 8, 2009 OPRA request and request Items No. 1 and 2 of the Complainant's April 24, 2009 OPRA request. Moreover, the Custodian timely complied with the Council's May 24, 2011 Interim Order by providing records for an *in camera* review and further complied with the Council's January 31, 2012 Interim Order by providing the records to the Complainant and the Custodian's certified confirmation of compliance to the Executive Director within the deadline to comply with said Order. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, 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.

Prepared By: Karyn Gordon, Esq.
In House Counsel

Approved By: Catherine Starghill, Esq.
Executive Director

February 21, 2012



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

RICHARD E. CONSTABLE, III
Acting Commissioner

INTERIM ORDER

January 31, 2012 Government Records Council Meeting

Joseph R. Armenti
Complainant

Complaint No. 2009-154

v.

Robbinsville Board of Education (Mercer)
Custodian of Record

At the January 31, 2012 public meeting, the Government Records Council (“Council”) considered the January 24, 2012 *In Camera* Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the amended findings and recommendations. The Council, therefore, finds that:

1. The Custodian has complied with the Council’s May 24, 2011 Interim Order by providing the Council with all records set forth in Paragraph 2 of the 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.**
3. 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.



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
September 25, 2008	Communication from Nicole Rossi to Molly Avery	Inter-agency or intra-agency advisory, consultative or deliberative material	<u>N.J.S.A.</u> 47:1A-1.1	Exempt from disclosure as advisory, consultative or deliberative material pursuant to <u>N.J.S.A.</u> 47:1A-1.1 because it contains draft material.
December 2, 2008	Communication from Nicole Rossi to Molly Avery	Inter-agency or intra-agency advisory, consultative or deliberative material	<u>N.J.S.A.</u> 47:1A-1.1	Disclosable in its entirety. Pursuant to the Custodian's legal certification dated December 21, 2011, subject was approved by the governing body on March 31, 2009 and therefore no longer constituted advisory, consultative or deliberative material pursuant to <u>N.J.S.A.</u> 47:1A-1.1.
December 17, 2008	Communication from Nicole Rossi to Molly Avery	Inter-agency or intra-agency advisory, consultative or deliberative material	<u>N.J.S.A.</u> 47:1A-1.1	Exempt from disclosure as advisory, consultative or deliberative material pursuant

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 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.

				to <u>N.J.S.A.</u> 47:1A-1.1 because it contains draft material.
December 17, 2008	Communication from Nicole Rossi to Molly Avery	Inter-agency or intra-agency advisory, consultative or deliberative material	<u>N.J.S.A.</u> 47:1A-1.1	Redact the four (4) lines following "Hi" as advisory, consultative and deliberative material pursuant to <u>N.J.S.A.</u> 47:1A-1.1. because it contains draft material. All other material is disclosable.

Interim Order Rendered by the
Government Records Council
On The 31st Day of January, 2012

Robin Berg Tabakin, Chair
Government Records Council

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

Denise Parkinson Vetti, Secretary
Government Records Council

Decision Distribution Date: February 2, 2012

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

***In Camera* Findings and Recommendations of the Executive Director
January 31, 2012 Council Meeting**

**Joseph R. Armenti¹
Complainant**

GRC Complaint No. 2009-154

v.

**Robbinsville Board of Education (Mercer)²
Custodian of Records**

Records Relevant to Complaint:

April 8, 2009 request:

1. E-mails and all attachments thereto sent from Dr. John J. Szabo to all administrators, school board members, school board staff, employees and any news media from September 23, 2008 through December 31, 2008 containing in the subject or body of the e-mails the following key words: Armenti, GSA, GSE, Gay Straight Alliance, Garden State Equality, Goldstein, gay slur, gay, diversity, forum, Molly Avery, Margo Saltzman, Carol Watchler, Allison Sussman, Pethybridge, Sierkerka, Williams, Guiducci, Schulman, First Amendment, right.
2. Letters sent by Dr. John J. Szabo to all administrators, school board members, school staff, employees and news media from September 23, 2008 through December 31, 2008 containing the words: Armenti, GSA, GSE, Gay Straight Alliance, Garden State Equality, Goldstein, gay, slur, diversity, Avery, Sussman, Pethybridge, Williams, Siekerka, Guiducci, Schulman, First Amendment, right;
3. E-mails and letters sent by Dr. John J. Szabo to all news media from September 23, 2008 to December 31, 2008 containing the words Armenti, GSA, GSE, Gay Straight Alliance, Garden State Equality, Goldstein, gay, slur, diversity, Avery, Sussman, Pethybridge, Williams, Siekerka, Guiducci, Schulman, First Amendment, rights;
4. E-mails and letters sent from Molly Avery to Dr. John J. Szabo, all administrators, school board members and news media from September 23, 2009 to December 31, 2008 containing the words: Armenti, GSA, GSE, Gay Straight Alliance, Garden State Equality, Goldstein, gay, slur, First Amendment, right, diversity, Sussman, Pethybridge, Williams, Sierkerka, Guiducci, Schulman, Watchler.

April 24, 2009 request:

1. All e-mails and letters from Nicole Rossi to Molly Avery, Dr. Kathie Foster, school board members, school staff, school employees, Steven Goldstein, Carmen Cusido and any news media from September 23, 2008 to December 31, 2008 containing the following key words in the Subject or body of the e-mails, and all

¹ No legal representation listed on record.

² Represented by Thomas Segreto, Esq., Scarinci & Hollenbeck (Lyndhurst, NJ).

- attachments thereto: Armenti, GSA, GSE, Gay Straight Alliance, Garden State Equality, Steven Goldstein, gay slur, gay, diversity, homophobe, hate, forum, Margo, Saltzman, Watchler, Allison, Sussman, First Amendment, right, David Pethybridge, Michele Sierkerka, Carmen, Cusido, Trenton Times, Times of Trenton, Times, Allen Spear, Washington Blade, Out in New Jersey.net, Governor Jon Corzine, radio, station, 101.5;
2. All e-mails and letters from Molly Avery to Nicole Rossi, Dr. Kathie Foster, school board members, school staff, school employees, Steven Goldstein, Carmen Cusido and any news media from September 23, 2008 to December 31, 2008 containing the following key words in the Subject or the body of the e-mail, and all attachments thereto: Armenti, GSA, GSE, Gay Straight Alliance, Garden State Equality, Steven, Goldstein, gay slur, gay, diversity, homophobe, hate, forum, Margo, Saltzman, Watchler, Allison, Sussman, First Amendment, right, David Pethybridge, Michele Siekerka, Carmen, Cusido, Trenton Times, Times of Trenton, Times, Allen Spear, Washington Blade, Out in New Jersey.net, Governor, Jon, Corzine, radio, station, 101.5.

Request Made: April 8, 2009; April 24, 2009

Response Made: May 4, 2009

Custodian: Robert DeVita³

GRC Complaint Filed: May 8, 2009⁴

Background

May 24, 2011

Government Records Council's Interim Order. At the May 24, 2011 public meeting, the Government Records Council ("Council") considered the May 17, 2011 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 Complainant's April 8, 2009 request at Item No. 4 for e-mails and letters sent from Molly Avery to Dr. John J. Szabo, and the Complainant's April 24, 2009 request at Item No. 1 for e-mails and letters from Nicole Rossi to Molly Avery, Dr. Kathie Foster, Steven Goldstein and Carmen Cusido and Item No. 2 for e-mails and letters from Molly Avery to Nicole Rossi, Dr. Kathie Foster, Steven Goldstein, and Carmen Cusido are valid under OPRA because these request items identify by name the specific recipients of the e-mails and letters sought. The remainder of the Complainant's April 8, 2009 and April 24, 2009 requests are not valid under OPRA because they fails to identify by name the specific recipients of the e-mails and letters sought, fail to specify identifiable government records and would require the Custodian to perform research which he is not required to do. MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005); Bent v. Stafford Police Department, 381 N.J. Super. 30 (App. Div. 2005); New Jersey Builders Association v. New Jersey Council on

³ The original Custodian of Record is Louise B. Davis, who retired in December, 2009.

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

Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009). *See also* Elcavage v. West Milford Twp., GRC Complaint Nos. 2009-07 and 2009-08 (March 2010).

2. 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 e-mails and letters sent from Molly Avery to Dr. John J. Szabo, and the e-mails and letters from Nicole Rossi to Molly Avery, Dr. Kathie Foster, Steven Goldstein and Carmen Cusido and the e-mails and letters from Molly Avery to Nicole Rossi, Dr. Kathie Foster, Steven Goldstein, and Carmen Cusido referenced in the Custodian's May 4, 2009 Redaction/Exemption Inventory (attached hereto as Exhibit A) to determine the validity of the Custodian's assertion that the records constitute inter-agency or intra-agency advisory, consultative or deliberative material which is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1.
3. **The Custodian must deliver⁵ to the Council in a sealed envelope nine (9) copies of the requested unredacted document (see #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 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. **Concurrently with the delivery to the Council of the records listed in paragraph 4 above, the Custodian must provide a legal certification in accordance with N.J. Court Rule 1:4-4⁸, that the records provided are all of the records in existence and no other records have been withheld.**
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.

May 25, 2011

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

May 27, 2011

E-mail from the Custodian's Counsel to the GRC. Counsel requests an extension of time until June 6, 2011 to produce records for an *in camera* review.

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."

⁸ "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."

May 27, 2011

E-mail from the GRC to the Custodian's Counsel. The GRC grants Counsel an extension of time until June 6, 2011 to provide records for an *in camera* review.

June 6, 2011

E-mail from the Custodian's Counsel to the GRC. Counsel states that pursuant to an earlier telephone conversation, she is reviewing, collating and producing the responsive records. Counsel states that due to the number of responsive records, she is requesting an extension of two (2) business days to provide same.

June 7, 2011

E-mail from the GRC to the Custodian's Counsel. The GRC grants Counsel an extension of two (2) business days to provide records for an *in camera* review.

June 8, 2011

E-mail from the Custodian's Counsel to the GRC. Counsel states that pursuant to an earlier telephone conversation, the Robbinsville Board of Education ("BOE") is encountering issues in regard to collecting and providing records to the GRC for an *in camera* review.

Counsel states that Mr. Derek Linebarger ("Mr. Linebarger"), Director of Technology for the BOE, was forced to recreate an index to retrieve records because there was an error in the last index that was retrieving unresponsive records. Counsel further states that the BOE recently changed representation. Counsel states that in order to determine whether the old law firm possessed any responsive records, she contacted same. Counsel states that she was informed that previous counsel to the BOE was no longer with the law firm, but that all records held by said firm were forwarded back to the BOE.

Counsel thus requests an additional week to locate, retrieve and provide the responsive records for an *in camera* review.

June 10, 2011

E-mail from the GRC to the Custodian's Counsel. The GRC grants Counsel an extension of one (1) week to provide the responsive records for an *in camera* review.

June 15, 2011

E-mail from the Custodian's Counsel to the GRC. Counsel states that the BOE retrieved the responsive records from their computer system. Counsel further states that the Custodian is currently out of the office until June 20, 2011. Counsel requests an extension of time until June 21, 2011 to properly review and index the responsive records and obtain the Custodian's executed certification of compliance.⁹

June 20, 2011

E-mail from the Custodian's Counsel to the GRC. Counsel states that she is preparing the records to be sent to the GRC and anticipates the total number of pages will be between 500 and 1,000 pages. Counsel asks whether the GRC would prefer hard copies of the records or CDs.

⁹ The evidence of record indicates that the GRC verbally granted an extension of time on an unspecified date. Joseph R. Armenti v. Robbinsville Board of Education (Mercer), 2009-154 – *In Camera* Findings and Recommendations of the Executive Director 4

June 21, 2011

E-mail from the GRC to the Custodian's Counsel. The GRC states that the May 24, 2011 Interim Order requires that nine (9) hard copies of the records be provided for the *in camera* review.

June 21, 2011

E-mail from the Custodian's Counsel to the GRC. Counsel states that the number of records is less than originally anticipated. Counsel confirms that she will simultaneously send hard copies to the GRC via overnight mail and e-mail a copy of the records.

June 21, 2011

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

- E-mail from Ms. Nicole Rossi ("Ms. Rossi") to Ms. Molly Avery ("Ms. Avery") dated September 25, 2008 attaching "The Raven" Parent's Newsletter, Volume 1, Issue No. 2 (October 2008).
- E-mail from Ms. Rossi to Ms. Avery dated December 2, 2008 attaching the "Co-Curricular Salaries, 2009-2010 Budget."
- E-mail from Ms. Rossi to Ms. Avery dated December 17, 2008.
- E-mail from Ms. Rossi to Ms. Avery dated December 17, 2008.
- "Redaction/Exemption Document Inventory" log (undated).

The Custodian certifies that he assumed the duties of Custodian on January 4, 2010 and is not familiar with the contents of the records originally provided and withheld. The Custodian certifies that pursuant to the Council's May 24, 2011 Interim Order, the Custodian relied on the "Redaction/Exemption Document Inventory" log to provide the four (4) attached records. The Custodian certifies that the records provided represent the full and complete records required to be submitted to the GRC for an *in camera* review.

December 16, 2011

Letter from the GRC to the Custodian. The GRC states that its regulations provide that "[t]he Council, acting through its Executive Director, may require custodians to submit, within prescribed time limits, additional information deemed necessary for the Council to adjudicate the complaint." *N.J.A.C. 5:105-2.4(l)*. The GRC states that it reviewed the Custodian's *in camera* submission and has determined that additional information is required.

The GRC states that a record entitled "Co-Curricular Salaries, 2009-2010 Budget" was submitted as part of the *in camera* review. The GRC states that it is unclear whether this budget was approved at the time of the Complainant's April 8, 2009 OPRA request. The GRC requests that the Custodian provide a legal certification, pursuant to N.J. Court Rule 1:4-4, in response to the following:

1. What date did the Board of Education approve, pass or otherwise ratify the 2009-2010 budget attached as part of the *in camera* submission?

The GRC requests that the Custodian provide the requested legal certification by close of business on December 21, 2011. The GRC states that submissions received after the deadline date may not be considered by the Council for adjudication.

December 21, 2011

Custodian's legal certification. The Custodian certifies that the BOE's entire budget, which includes the "Co-Curricular Salaries, 2009-2010 Budget," was approved on March 31, 2009.

Analysis

Whether the Custodian complied with the Council's May 24, 2011 Interim Order?

At its May 24, 2011 public meeting, the Council determined that because the Custodian has asserted that the requested records were lawfully denied because the records constitute inter-agency or intra-agency advisory, consultative or deliberative ("ACD") material which is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1., the Council 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). Therefore, the GRC must conduct an *in camera* review of the requested records to determine the validity of the Custodian's assertion that the requested record was properly denied.

The Council therefore ordered the Custodian to deliver to the Council in a sealed envelope nine (9) copies of the requested unredacted records, 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 records provided are the records 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 June 1, 2011.

The Custodian's Counsel subsequently requested extensions of time to provide the records for an *in camera* review on May 26, 2011, June 6, 2011, June 8, 2011 and June 15, 2011 respectively. The GRC granted extensions of time until June 6, 2011, June 8, 2011, June 15, 2011 and June 21, 2011 respectively. The Custodian's Counsel provided the records for an *in camera* review and the Custodian's certified confirmation of compliance to the Executive Director on June 21, 2011.

Therefore, the Custodian timely complied with the Council's May 24, 2011 Interim Order by providing the records for an *in camera* review and Custodian's certified confirmation of compliance to the Executive Director within the extended deadline to comply with said Order.

Whether the Custodian unlawfully denied the Complainant access to the requested records?

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> Examination¹⁰
September 25, 2008	Communication from Nicole Rossi to Molly Avery	Inter-agency or intra-agency advisory, consultative or deliberative material	<u>N.J.S.A.</u> 47:1A-1.1	Exempt from disclosure as advisory, consultative or deliberative material pursuant to <u>N.J.S.A.</u> 47:1A-1.1 because it contains draft material.
December 2, 2008	Communication from Nicole Rossi to Molly Avery	Inter-agency or intra-agency advisory, consultative or deliberative material	<u>N.J.S.A.</u> 47:1A-1.1	Disclosable in its entirety. Pursuant to the Custodian's legal certification dated December 21, 2011, subject was approved by the governing body on March 31, 2009 and therefore no longer constituted advisory, consultative or deliberative material pursuant to <u>N.J.S.A.</u> 47:1A-1.1.
December 17, 2008	Communication from Nicole Rossi to Molly	Inter-agency or intra-agency advisory,	<u>N.J.S.A.</u> 47:1A-1.1	Exempt from disclosure as advisory,

¹⁰ **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.

	Avery	consultative or deliberative material		consultative or deliberative material pursuant to <u>N.J.S.A. 47:1A-1.1</u> because it contains draft material.
December 17, 2008	Communication from Nicole Rossi to Molly Avery	Inter-agency or intra-agency advisory, consultative or deliberative material	<u>N.J.S.A. 47:1A-1.1</u>	Redact the four (4) lines following “Hi” as advisory, consultative and deliberative material pursuant to <u>N.J.S.A. 47:1A-1.1</u> . because it contains draft material. All other material is disclosable.

Thus, the Custodian must disclose the material which is not exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1 to the Complainant.

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.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian has complied with the Council’s May 24, 2011 Interim Order by providing the Council with all records set forth in Paragraph 2 of the 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 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: Karyn Gordon, Esq.
In House Counsel

Approved By: Catherine Starghill, Esq.
Executive Director

January 24, 2012



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

INTERIM ORDER

May 24, 2011 Government Records Council Meeting

Joseph R. Armenti
Complainant

Complaint No. 2009-154

v.

Robbinsville Board of Education (Mercer)
Custodian of Record

At the May 24, 2011 public meeting, the Government Records Council (“Council”) considered the May 17, 2011 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 Complainant’s April 8, 2009 request at Item No. 4 for e-mails and letters sent from Molly Avery to Dr. John J. Szabo, and the Complainant’s April 24, 2009 request at Item No. 1 for e-mails and letters from Nicole Rossi to Molly Avery, Dr. Kathie Foster, Steven Goldstein and Carmen Cusido and Item No. 2 for e-mails and letters from Molly Avery to Nicole Rossi, Dr. Kathie Foster, Steven Goldstein, and Carmen Cusido are valid under OPRA because these request items identify by name the specific recipients of the e-mails and letters sought. The remainder of the Complainant’s April 8, 2009 and April 24, 2009 requests are not valid under OPRA because they fail to identify by name the specific recipients of the e-mails and letters sought, fail to specify identifiable government records and would require the Custodian to perform research which he is not required to do. MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005); Bent v. Stafford Police Department, 381 N.J. Super. 30 (App. Div. 2005); New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009). *See also* Elcavage v. West Milford Twp., GRC Complaint Nos. 2009-07 and 2009-08 (March 2010).
2. 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 e-mails and letters sent from Molly Avery to Dr. John J. Szabo, and the e-mails and letters from Nicole Rossi to Molly Avery, Dr. Kathie Foster, Steven Goldstein and Carmen Cusido and the e-mails and letters from Molly Avery to Nicole Rossi, Dr. Kathie Foster, Steven Goldstein, and Carmen Cusido referenced in the Custodian’s May 4, 2009 Redaction/Exemption Inventory (attached hereto as Exhibit A) to determine the validity of the Custodian’s assertion that the records constitute inter-agency or intra-



agency advisory, consultative or deliberative material which is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1.

3. **The Custodian must deliver¹ to the Council in a sealed envelope nine (9) copies of the requested unredacted document (see #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 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. **Concurrently with the delivery to the Council of the records listed in paragraph 4 above, the Custodian must provide a legal certification in accordance with N.J. Court Rule 1:4-4⁴, that the records provided are all of the records in existence and no other records have been withheld.**
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 24th Day of May, 2011

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: May 25, 2011

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."

⁴ "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
May 24, 2011 Council Meeting**

**Joseph R. Armenti¹
Complainant**

GRC Complaint No. 2009-154

v.

**Robbinsville Board of Education (Mercer)²
Custodian of Records**

Records Relevant to Complaint:

April 8, 2009 request:

1. E-mails and all attachments thereto sent from Dr. John J. Szabo to all administrators, school board members, school board staff, employees and any news media from September 23, 2008 through December 31, 2008 containing in the subject or body of the e-mails the following key words: Armenti, GSA, GSE, Gay Straight Alliance, Garden State Equality, Goldstein, gay slur, gay, diversity, forum, Molly Avery, Margo Saltzman, Carol Watchler, Allison Sussman, Pethybridge, Sierkerka, Williams, Guiducci, Schulman, First Amendment, right.
2. Letters sent by Dr. John J. Szabo to all administrators, school board members, school staff, employees and news media from September 23, 2008 through December 31, 2008 containing the words: Armenti, GSA, GSE, Gay Straight Alliance, Garden State Equality, Goldstein, gay, slur, diversity, Avery, Sussman, Pethybridge, Williams, Siekerka, Guiducci, Schulman, First Amendment, right;
3. E-mails and letters sent by Dr. John J. Szabo to all news media from September 23, 2008 to December 31, 2008 containing the words Armenti, GSA, GSE, Gay Straight Alliance, Garden State Equality, Goldstein, gay, slur, diversity, Avery, Sussman, Pethybridge, Williams, Siekerka, Guiducci, Schulman, First Amendment, rights;
4. E-mails and letters sent from Molly Avery to Dr. John J. Szabo, all administrators, school board members and news media from September 23, 2009 to December 31, 2008 containing the words: Armenti, GSA, GSE, Gay Straight Alliance, Garden State Equality, Goldstein, gay, slur, First Amendment, right, diversity, Sussman, Pethybridge, Williams, Sierkerka, Guiducci, Schulman, Watchler.

April 24, 2009 request:

1. All e-mails and letters from Nicole Rossi to Molly Avery, Dr. Kathie Foster, school board members, school staff, school employees, Steven Goldstein,

¹ No legal representation listed on record.

² Represented by Thomas Segreto, Esq., Scarinci & Hollenbeck (Lyndhurst, NJ).

- Carmen Cusido and any news media from September 23, 2008 to December 31, 2008 containing the following key words in the Subject or body of the e-mails, and all attachments thereto: Armenti, GSA, GSE, Gay Straight Alliance, Garden State Equality, Steven Goldstein, gay slur, gay, diversity, homophobe, hate, forum, Margo, Saltzman, Watchler, Allison, Sussman, First Amendment, right, David Pethybridge, Michele Sierkerka, Carmen, Cusido, Trenton Times, Times of Trenton, Times, Allen Spear, Washington Blade, Out in New Jersey.net, Governor Jon Corzine, radio, station, 101.5;
2. All e-mails and letters from Molly Avery to Nicole Rossi, Dr. Kathie Foster, school board members, school staff, school employees, Steven Goldstein, Carmen Cusido and any news media from September 23, 2008 to December 31, 2008 containing the following key words in the Subject or the body of the e-mail, and all attachments thereto: Armenti, GSA, GSE, Gay Straight Alliance, Garden State Equality, Steven, Goldstein, gay slur, gay, diversity, homophobe, hate, forum, Margo, Saltzman, Watchler, Allison, Sussman, First Amendment, right, David Pethybridge, Michele Siekerka, Carmen, Cusido, Trenton Times, Times of Trenton, Times, Allen Spear, Washington Blade, Out in New Jersey.net, Governor, Jon, Corzine, radio, station, 101.5..

Request Made: April 8, 2009; April 24, 2009

Response Made: May 4, 2009

Custodian: Louise B. Davis

GRC Complaint Filed: May 8, 2009³

Background

April 8, 2009

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.

April 20, 2009

Custodian's response to the OPRA request. The Custodian responds in writing to the Complainant's OPRA request on the seventh (7th) business day following receipt of such request. The Custodian states that the records requested by the Complainant are e-mail communications which must be reviewed and analyzed for redactions and appropriate exemptions. The Custodian requests an additional ten (10) business days to perform such review and redactions pursuant to Cody v. Middletown Township Public Schools, GRC Complaint No. 2005-98 (December 2006). The Custodian states that the Robbinsville Board of Education will provide a response by May 4, 2009.

The Custodian states that if the Complainant does not agree to such extension, the extensive nature of the work involved would be disruptive to the Custodian's office, inasmuch as the equipment necessary for the work is not readily available throughout the course of a business day and, moreover, that the Board has limited personnel resources to dedicate to the time intensive tasks required to satisfy the Complainant's OPRA request.

³ The GRC received the Denial of Access Complaint on said date.

April 24, 2009

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.

May 4, 2009

Custodian’s response to the OPRA request. The Custodian responds in writing to the Complainant’s OPRA request on the sixth (6th) business day following receipt of such request.

The Custodian provides access to some of the records responsive to this request as well as to the Complainant’s April 8, 2009 OPRA request. The Custodian attaches a Redaction/Exemption Inventory identifying which records were not provided as well as the legal reason such records were withheld.

The Custodian asserts that the Complainant’s OPRA requests are broad-based demands requiring research and analysis which is outside the statutory ambit of OPRA. The Custodian argues that MAG Entertainment LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005), states that OPRA does not require records custodians to conduct research among records for a requestor and to correlate data from various government records in the custodian’s possession. The Custodian further argues that in Bent v. Twp of Stafford Police Dep’t, 381 N.J. Super. 30, 33 (App. Div. 2005), the court held that the requestor’s general request for information did not constitute a request for government records and was therefore invalid. The Custodian contends that in reaching this conclusion, the court noted that OPRA mandates that the request form provide space for a brief description of the record request. *Id.* The Custodian also contends that in New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166 (App. Div. 2006) as well as Gannett New Jersey Partners LLP v. County of Middlesex, 379 N.J. Super. 205, 213 (App. Div. 2005), the court specifically pointed to the same statutory request form requirement in determining that OPRA does not authorize requestors to make blanket requests for agency records; instead, OPRA requires a party requesting access to a public record to specifically describe the document sought. The Custodian finally asserts that under Mag Entertainment, OPRA does not countenance open-ended searches of an agency’s files.

Nevertheless, the Custodian states that a search timeline from September 23, 2008 to December 21, 2008 is enclosed as well as redacted records responsive to the Complainant’s April 8, 2009 and April 24, 2009 OPRA requests.

The Custodian states that copying fees for the responsive records totaling 61 pages is \$22.75 pursuant to the schedule of fees noted on the Board of Education’s OPRA request form.

The Redaction/Exemption Inventory indicates the following:

Date	Document Description	Reason for Exemption	Statutory Basis
September 25, 2008	Communication	Inter-agency or	N.J.S.A. 47:1A-1.1

	from Nicole Rossi to John Szabo	intra-agency advisory, consultative or deliberative material	
September 25, 2008	Communication from Nicole Rossi to Molly Avery	Inter-agency or intra-agency advisory, consultative or deliberative material	<u>N.J.S.A. 47:1A-1.1</u>
September 25, 2008	Communication from Nicole Rossi to Michael Bruno	Inter-agency or intra-agency advisory, consultative or deliberative material	<u>N.J.S.A. 47:1A-1.1</u>
September 25, 2008	Communication from Nicole Rossi to John Szabo	Inter-agency or intra-agency advisory, consultative or deliberative material	<u>N.J.S.A. 47:1A-1.1</u>
October 1, 2008	Communication from Nicole Rossi to Allison Sussman	Inter-agency or intra-agency advisory, consultative or deliberative material	<u>N.J.S.A. 47:1A-1.1</u>
October 1, 2008	Correspondence from John Szabo to Counsel	Attorney Client Privileged document	<u>N.J.S.A. 47:1A-1.1</u>
October 2, 2008	Correspondence from John Szabo to Counsel	Attorney Client Privileged document	<u>N.J.S.A. 47:1A-1.1</u>
October 2, 2008	Communication from John Szabo to Counsel	Attorney Client Privileged document	<u>N.J.S.A. 47:1A-1.1</u>
October 2, 2008	Communication from John Szabo to Kathy Foster re: draft of communication to Gay/Straight Alliance	Draft document, Inter-agency or intra-agency advisory, consultative or deliberative material	<u>N.J.S.A. 47:1A-1.1</u>
October 3, 2008	Communication from John Szabo to Counsel	Attorney Client Privileged document	<u>N.J.S.A. 47:1A-1.1</u>
October 6, 2008	Communication from John Szabo to Eileen DeLany attaching draft letter	Draft document, Inter-agency or intra-agency advisory,	<u>N.J.S.A. 47:1A-1.1</u>

	to Robbinsville High School Gay/Straight Alliance	consultative or deliberative material	
October 6, 2008	Communication from John Szabo to Eileen DeLany re: draft of communication to Gay/Straight Alliance	Draft document, Inter-agency or intra-agency advisory, consultative or deliberative material	<u>N.J.S.A. 47:1A-1.1</u>
October 6, 2008	Communication from John Szabo	Attorney Client Privileged document; inter-agency or intra-agency advisory, consultative or deliberative material	<u>N.J.S.A. 47:1A-1.1</u>
October 6, 2008	Communication from John Szabo regarding draft of communication to Gay/Straight Alliance	Draft document, Inter-agency or intra-agency advisory, consultative or deliberative material	<u>N.J.S.A. 47:1A-1.1</u>
October 6, 2008	Communication from Counsel to John Szabo	Attorney Client Privileged document	<u>N.J.S.A. 47:1A-1.1</u>
October 7, 2008	Communication from John Szabo to Counsel	Attorney Client Privileged document	<u>N.J.S.A. 47:1A-1.1</u>
October 7, 2008	Communication from John Szabo to Counsel	Attorney Client Privileged document	<u>N.J.S.A. 47:1A-1.1</u>
October 8, 2008	Communication from John Szabo to Counsel	Attorney Client Privileged document	<u>N.J.S.A. 47:1A-1.1</u>
October 8, 2008	Communication from John Szabo to Counsel	Attorney Client Privileged document	<u>N.J.S.A. 47:1A-1.1</u>
October 10, 2008	Communication from John Szabo to Counsel	Attorney Client Privileged document	<u>N.J.S.A. 47:1A-1.1</u>
October 10, 2008	Communication from John Szabo to Counsel	Attorney Client Privileged document	<u>N.J.S.A. 47:1A-1.1</u>
October 10, 2008	Communication from John Szabo to	Attorney Client Privileged document	<u>N.J.S.A. 47:1A-1.1</u>

	Counsel		
October 13, 2008	Communication from John Szabo to Counsel	Attorney Client Privileged document	<u>N.J.S.A. 47:1A-1.1</u>
October 14, 2008	Communication from John Szabo to Counsel	Attorney Client Privileged document	<u>N.J.S.A. 47:1A-1.1</u>
October 16, 2008	Communication from Nicole Rossi to High School Teachers	Inter-agency or intra-agency advisory, consultative or deliberative material	<u>N.J.S.A. 47:1A-1.1</u>
October 17, 2008	Communication from John Szabo to Board Member	Inter-agency or intra-agency advisory, consultative or deliberative material	<u>N.J.S.A. 47:1A-1.1</u>
October 17, 2008	Communication from John Szabo to Counsel	Attorney Client Privileged document	<u>N.J.S.A. 47:1A-1.1</u>
October 17, 2008	Communication from Nicole Rossi to High School Teachers	Inter-agency or intra-agency advisory, consultative or deliberative material	<u>N.J.S.A. 47:1A-1.1</u>
October 17, 2008	Communication from Nicole Rossi to Curtis Wyers	Inter-agency or intra-agency advisory, consultative or deliberative material	<u>N.J.S.A. 47:1A-1.1</u>
October 24, 2008	Communication from John Szabo to Counsel	Attorney Client Privileged document	<u>N.J.S.A. 47:1A-1.1</u>
October 27, 2008	Communication from Nicole Rossi to Curtis Wyers	Inter-agency or intra-agency advisory, consultative or deliberative material	<u>N.J.S.A. 47:1A-1.1</u>
October 27, 2008	Communication from Nicole Rossi to Eileen DeLany	Inter-agency or intra-agency advisory, consultative or deliberative material	<u>N.J.S.A. 47:1A-1.1</u>
November 14, 2008	Communication from Nicole Rossi to Chris Pena	Inter-agency or intra-agency advisory, consultative or	<u>N.J.S.A. 47:1A-1.1</u>

		deliberative material	
November 24, 2008	Communication from Nicole Rossi to High School Teachers	Inter-agency or intra-agency advisory, consultative or deliberative material	<u>N.J.S.A. 47:1A-1.1</u>
November 24, 2008	Communication from Nicole Rossi to Pat Gaynor	Inter-agency or intra-agency advisory, consultative or deliberative material	<u>N.J.S.A. 47:1A-1.1</u>
November 24, 2008	Communication from Nicole Rossi to Laurie Retondo	Inter-agency or intra-agency advisory, consultative or deliberative material	<u>N.J.S.A. 47:1A-1.1</u>
December 2, 2008	Communication from Nicole Rossi to High School Teachers	Inter-agency or intra-agency advisory, consultative or deliberative material	<u>N.J.S.A. 47:1A-1.1</u>
December 2, 2008	Communication from Nicole Rossi to Molly Avery	Inter-agency or intra-agency advisory, consultative or deliberative material	<u>N.J.S.A. 47:1A-1.1</u>
December 5, 2008	Communication from Nicole Rossi to Chris Pena	Inter-agency or intra-agency advisory, consultative or deliberative material	<u>N.J.S.A. 47:1A-1.1</u>
December 11, 2008	Communication from Nicole Rossi to High School Teachers	Inter-agency or intra-agency advisory, consultative or deliberative material	<u>N.J.S.A. 47:1A-1.1</u>
December 17, 2008	Communication from Nicole Rossi to Molly Avery	Inter-agency or intra-agency advisory, consultative or deliberative material	<u>N.J.S.A. 47:1A-1.1</u>
December 17, 2008	Communication from Nicole Rossi to Molly Avery	Inter-agency or intra-agency advisory, consultative or deliberative material	<u>N.J.S.A. 47:1A-1.1</u>

The Custodian asserts that the attorney client privileged portions of the records requested are intertwined with the balance of the record. Meakem v. Borough of Pompton Lakes, GRC Complaint No. 2003-66 (March 2004). The Custodian also asserts that Gannett NJ Partners LP v. County of Middlesex, 379 N.J. Super. 205 (App. Div. 2005) and Parave-Fogg v. Lower Alloways Creek Township, GRC Complaint No. 2006-51 (August 2006); In Re Liquidation of Integrity Insurance Company, 165 N.J. 75 (2000) apply to the records which are exempt from disclosure as inter-agency or intra-agency advisory, consultative or deliberative material. Finally, the Custodian asserts that O’Shea v. West Milford BOE, 391 N.J. Super. 534 (App. Div. 2007) provides that draft records are exempt from disclosure.

May 8, 2009

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

- Complainant’s OPRA request dated April 8, 2009
- Letter from the Custodian to the Complainant dated April 20, 2009
- Complainant’s OPRA request dated April 24, 2009
- Letter from the Custodian to the Complainant dated May 4, 2009

The Complainant asserts that the document descriptions do not fall under the statutory basis to deny access to the records requested.

The Complainant does not agree to mediate this complaint.

June 1, 2009

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

June 15, 2009

Custodian’s SOI with the following attachments:

- Complainant’s OPRA request dated April 8, 2009
- Letter from the Custodian to the Complainant, dated April 20, 2009
- Letter from the Complainant to the Custodian, undated⁴
- Complainant’s OPRA request dated April 24, 2009
- Letter from the Custodian to the Complainant dated May 4, 2009
- Redaction/Exemption Document Inventory

The Custodian asserts that the Complainant’s OPRA requests arise from an incident which occurred while the Complainant was a member of the Robbinsville Board of Education. The Custodian further asserts that such incident is the impetus for the Complainant’s OPRA requests.

The Custodian also asserts that the Custodian responded to such requests within the statutorily-mandated seven (7) business days and took the position that the requests

⁴ This letter was stamped as received by the Robbinsville Board of Education on April 24, 2009.
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were overly broad. The Custodian further asserts that the Custodian properly requested an extension of time to respond to the OPRA requests. The Custodian finally asserts that the Complainant was provided with all records responsive to the request except for draft documents which are exempt from disclosure under O’Shea v. West Milford BOE, 391 N.J. Super. 534 (App. Div. 2007), records exempt from disclosure pursuant to the exemption for inter- or intra-agency advisory, consultative or deliberative material (*see In Re Liquidation of Integrity Insurance Co.*, 165 N.J. 75 (2000); Gannett NJ Partners LPO v. County of Middlesex, 379 N.J. Super. 205 (App. Div. 2005) and Parave-Fogg v. Lower Alloways Creek Twp., GRC Complaint No. 2006-51 (August 2006)), as well as communications subject to the attorney-client privilege (*see Meakem v. Borough of Pompton Lakes*, GRC Complaint No. 2003-66 (March 2004)).

Analysis

Whether the Custodian unlawfully denied access to the requested records?

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 ...” (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 the matter before the Council, the Complainant sought e-mails and letters containing specific key words from September 23, 2008 to December 31, 2008 from and to a variety of individuals, some of whom were identified by name and some of whom

were not identified by name. The Complainant's request is invalid under OPRA because it is overly broad and would require the Custodian to perform research to locate and identify responsive records.

The New Jersey Superior Court has held that "[w]hile OPRA provides an alternative means of access to government documents not otherwise exempted from its reach, *it is not intended as a research tool litigants may use to force government officials to identify and siphon useful information. Rather, OPRA simply operates to make identifiable government records 'readily accessible for inspection, copying, or examination.'* N.J.S.A. 47:1A-1." (Emphasis added.) MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005). As the court noted in invalidating MAG's request under OPRA:

"Most significantly, the request failed to identify with any specificity or particularity the governmental records sought. MAG provided neither names nor any identifiers other than a broad generic description of a brand or type of case prosecuted by the agency in the past. Such an open-ended demand required the Division's records custodian to manually search through all of the agency's files, analyze, compile and collate the information contained therein, and identify for MAG the cases relative to its selective enforcement defense in the OAL litigation. Further, once the cases were identified, the records custodian would then be required to evaluate, sort out, and determine the documents to be produced and those otherwise exempted." *Id.* at 549.

The Court further held that "[u]nder OPRA, *agencies are required to disclose only 'identifiable' government records* not otherwise exempt ... In short, OPRA does not countenance open-ended searches of an agency's files." (Emphasis added.) *Id.*

Further, in Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 2005),⁵ the Superior Court references MAG in that the Court held that a requestor must specifically describe the document sought because OPRA operates to make identifiable government records "accessible." "As such, a proper request under OPRA must identify with reasonable clarity those documents that are desired, and a party cannot satisfy this requirement by simply requesting all of an agency's documents."⁶

Additionally, in New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007), the court enumerated the responsibilities of a custodian and a requestor as follows:

"OPRA identifies the responsibilities of the requestor and the agency relevant to the prompt access the law is designed to provide. The custodian, who is the person designated by the director of the agency, N.J.S.A. 47:1A-1.1, must adopt forms for requests, locate and redact

⁵ Affirmed on appeal regarding Bent v. Stafford Police Department, GRC Case No. 2004-78 (October 2004).

⁶ As stated in Bent, *supra*.

documents, isolate exempt documents, assess fees and means of production, identify requests that require "extraordinary expenditure of time and effort" and warrant assessment of a "service charge," and, when unable to comply with a request, "indicate the specific basis." N.J.S.A. 47:1A-5(a)-(j). The requestor must pay the costs of reproduction and submit the request with information that is essential to permit the custodian to comply with its obligations. N.J.S.A. 47:1A-5(f), (g), (i). *Research is not among the custodian's responsibilities.*" (Emphasis added), NJ Builders, 390 N.J. Super. at 177.

Moreover, the court cited MAG by stating that "...when a request is 'complex' because it fails to specifically identify the documents sought, then that request is not 'encompassed' by OPRA..." The court also quoted N.J.S.A. 47:1A-5.g in that "[i]f a request for access to a government record would substantially disrupt agency operations, the custodian may deny access to the record after attempting to reach a reasonable solution with the requestor that accommodates the interests of the requestor and the agency." The court further stated that "...the Legislature would not expect or want courts to require more persuasive proof of the substantiality of a disruption to agency operations than the agency's need to...generate new records..."

Furthermore, in Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009), the Council held that "[b]ecause the Complainant's OPRA requests # 2-5 are not requests for identifiable government records, the requests are invalid and the Custodian has not unlawfully denied access to the requested records pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005) and Bent v. Stafford Police Department, 381 N.J. Super. 30 (App. Div. 2005)."

The test under MAG then, is whether a requested record is a *specifically identifiable* government record. If so, the record is disclosable, barring any exemptions to disclosure contained in OPRA. The GRC established the criteria deemed necessary to specifically identify an e-mail communication in Sandoval v. NJ State Parole Board, GRC Complaint No. 2006-167 (October 2008). In Sandoval, the Complainant requested "e-mail...between [two individuals] from April 1, 2005 through June 23, 2006 [using seventeen (17) different keywords]." The Custodian denied the request, claiming that it was overly broad. The Council determined:

"The Complainant in the complaint now before the GRC requested specific e-mails *by recipient, by date range and by content*. Based on that information, the Custodian has identified [numerous] e-mails which fit the specific recipient and date range criteria Complainant requested." (Emphasis added.) *Id.*

In Elcavage v. West Milford Twp., GRC Complaint Nos. 2009-07 and 2009-08 (March 2010), the Council examined what constitutes a valid request for e-mails under OPRA. The Council determined that:

“In accord with MAG, supra, and its progeny, in order to specifically identify an e-mail, OPRA requests must contain (1) the content and/or subject of the e-mail, (2) the specific date or range of dates during which the e-mail was transmitted or the e-mails were transmitted, and (3) a valid e-mail request must identify the sender and/or the recipient thereof.” (Emphasis in original). *Id.*

In the instant matter, in both of the requests submitted, the Complainant identified the date range and the content of the e-mails and letters sought. However, although the Complainant identified by name some of the senders and recipients of the communications he sought, he identified the remainder of the recipients as “administrators, school board members, school board staff, employees and ... news media.” These are not specifically identified individuals. In order for the Custodian to respond to these requests, the Custodian would be required to evaluate all e-mails and letters from the specifically-identified individuals which contained the particular key words specified to determine whether the recipients of such communications were administrators, school board members, school board staff, employees and/or members of the news media. This activity constitutes research, which the Custodian is not required to perform. MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005); Bent v. Stafford Police Department, 381 N.J. Super. 30 (App. Div. 2005); New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009). *See also* Elcavage v. West Milford Twp., GRC Complaint Nos. 2009-07 and 2009-08 (March 2010).

Therefore, the Complainant’s April 8, 2009 request at Item No. 4 for e-mails and letters sent from Molly Avery to Dr. John J. Szabo, and the Complainant’s April 24, 2009 request at Item No. 1 for e-mails and letters from Nicole Rossi to Molly Avery, Dr. Kathie Foster, Steven Goldstein and Carmen Cusido and Item No. 2 for e-mails and letters from Molly Avery to Nicole Rossi, Dr. Kathie Foster, Steven Goldstein, and Carmen Cusido are valid under OPRA because these request items identify by name the specific recipients of the e-mails and letters sought. The remainder of the Complainant’s April 8, 2009 and April 24, 2009 requests are not valid under OPRA because they fail to identify by name the specific recipients of the e-mails and letters sought, fail to specify identifiable government records and would require the Custodian to perform research which he is not required to do. MAG, supra; Bent, supra; New Jersey Builders, supra; Schuler, supra. *See also* Elcavage, supra. The Custodian has therefore borne her burden of proving a lawful denial of access to the requested records. N.J.S.A. 47:1A-6.

The Custodian withheld from disclosure e-mails and letters sent from Molly Avery to Dr. John J. Szabo, and e-mails and letters from Nicole Rossi to Molly Avery, Dr. Kathie Foster, Steven Goldstein and Carmen Cusido, and e-mails and letters from Molly Avery to Nicole Rossi, Dr. Kathie Foster, Steven Goldstein, and Carmen Cusido, asserting that the records are exempt from OPRA as inter-agency or intra-agency advisory, consultative or deliberative material pursuant to N.J.S.A. 47:1A-1.1. The Custodian released a Redaction/Exemption Inventory to the Complainant on May 4, 2009, outlining the records deemed to be exempt from disclosure and the reason for denial.

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 GRC⁷ 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 following e-mails and letters sent from Molly Avery to Dr. John J. Szabo, and the e-mails and letters from Nicole Rossi to Molly Avery, Dr. Kathie Foster, Steven Goldstein and Carmen Cusido and the e-mails and letters from Molly Avery to Nicole Rossi, Dr. Kathie Foster, Steven Goldstein, and Carmen Cusido referenced in the Custodian’s May 4, 2009 Redaction/Exemption Inventory (attached hereto as Exhibit A) to determine the validity of the Custodian’s assertion that the records constitute ACD material which is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1.

⁷ Paff v. NJ Department of Labor, Board of Review, GRC Complaint No. 2003-128 (October 2005).
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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. The Complainant's April 8, 2009 request at Item No. 4 for e-mails and letters sent from Molly Avery to Dr. John J. Szabo, and the Complainant's April 24, 2009 request at Item No. 1 for e-mails and letters from Nicole Rossi to Molly Avery, Dr. Kathie Foster, Steven Goldstein and Carmen Cusido and Item No. 2 for e-mails and letters from Molly Avery to Nicole Rossi, Dr. Kathie Foster, Steven Goldstein, and Carmen Cusido are valid under OPRA because these request items identify by name the specific recipients of the e-mails and letters sought. The remainder of the Complainant's April 8, 2009 and April 24, 2009 requests are not valid under OPRA because they fail to identify by name the specific recipients of the e-mails and letters sought, fail to specify identifiable government records and would require the Custodian to perform research which he is not required to do. MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005); Bent v. Stafford Police Department, 381 N.J. Super. 30 (App. Div. 2005); New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009). *See also* Elcavage v. West Milford Twp., GRC Complaint Nos. 2009-07 and 2009-08 (March 2010).
2. 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 e-mails and letters sent from Molly Avery to Dr. John J. Szabo, and the e-mails and letters from Nicole Rossi to Molly Avery, Dr. Kathie Foster, Steven Goldstein and Carmen Cusido and the e-mails and letters from Molly Avery to Nicole Rossi, Dr. Kathie Foster, Steven Goldstein, and Carmen Cusido referenced in the Custodian's May 4, 2009 Redaction/Exemption Inventory (attached hereto as Exhibit A) to determine the validity of the Custodian's assertion that the records constitute inter-agency or intra-agency advisory, consultative or deliberative material which is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1.

3. **The Custodian must deliver⁸ to the Council in a sealed envelope nine (9) copies of the requested unredacted document (see #3 above), a document or redaction index⁹, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4¹⁰, 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. **Concurrently with the delivery to the Council of the records listed in paragraph 4 above, the Custodian must provide a legal certification in accordance with N.J. Court Rule 1:4-4¹¹, that the records provided are all of the records in existence and no other records have been withheld.**
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: Karyn G. Gordon, Esq.
In House Counsel

Approved By: Catherine Starghill, Esq.
Executive Director

May 17, 2011¹²

⁸ 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.

⁹ The document or redaction index should identify the document and/or each redaction asserted and the lawful basis for the denial.

¹⁰ "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."

¹¹ "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."

¹² This complaint was prepared for adjudication on May 18, 2010; however, said complaint was not adjudicated due to the Council's lack of quorum.