



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

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

LORI GRIFA
Commissioner

FINAL DECISION

October 26, 2010 Government Records Council Meeting

Miguel Mendes
Complainant

Complaint No. 2009-184

v.

Freedom Academy Charter School (Camden)
Custodian of Record

At the October 26, 2010 public meeting, the Government Records Council (“Council”) considered the September 13, 2010 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that because the Custodian provided the records ordered to be disclosed with appropriate redactions to the Complainant on August 27, 2010, and because the Custodian provided certified confirmation of compliance pursuant to N.J. Court Rule 1:4-4 to the Executive Director within five (5) business days of receiving the Council’s Interim Order, the Custodian has complied with the Council’s August 24, 2010 Interim Order. Because all issues in this complaint have been resolved, no further adjudication is required.

This is the final administrative determination in this matter. Any further review should be pursued in the Appellate Division of the Superior Court of New Jersey within forty-five (45) days. Information about the appeals process can be obtained from the Appellate Division Clerk’s Office, Hughes Justice Complex, 25 W. Market St., PO Box 006, Trenton, NJ 08625-0006. Proper service of submissions pursuant to any appeal is to be made to the Council in care of the Executive Director at the State of New Jersey Government Records Council, 101 South Broad Street, PO Box 819, Trenton, NJ 08625-0819.

Final Decision Rendered by the
Government Records Council
On The 26th Day of October, 2010

Robin Berg Tabakin, Chair
Government Records Council



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

Charles A. Richman, Secretary
Government Records Council

Decision Distribution Date: November 3, 2010

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
October 26, 2010 Council Meeting**

**Miguel Mendes¹
Complainant**

GRC Complaint No. 2009-184

v.

**Freedom Academy Charter School
(Camden)²
Custodian of Records**

Records Relevant to Complaint: Copies of all personnel meeting minutes, executive session meeting minutes and e-mail correspondence between the Board and Mr. E. Harper (“Mr. Harper”), School Leader, relating to the Complainant’s employment at Freedom Academy Charter School (“School”) during the 2008-2009 school year which led to the non-renewal of the Complainant’s contract.

Request Made: May 21, 2009

Response Made: June 4, 2009

Custodian: Steven Gilmartin³

GRC Complaint Filed: June 5, 2009⁴

Background

August 24, 2010

Government Records Council’s (“Council”) Interim Order. At its August 24, 2010 public meeting, the Council considered the August 17, 2010 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. The Custodian has complied with the Council’s June 29, 2010 Interim Order by providing the Council with the record set forth in Paragraph 4 of the Order within five (5) business days of receiving the Council’s Order.

2. The *In Camera* Examination reveals the Custodian has lawfully denied access to the discussions in the requested May 14, 2009 e-mail chain between and among the Board Attorney (Joseph F. Betley, Esq.), previous School Leader (E. Harper) and Board members pursuant to N.J.S.A. 47:1A-6 because the e-

¹ No legal representation listed on record.

² Represented by Joseph F. Betley, Esq., of Capehart & Scatchard, P.A. (Mount Laurel, NJ).

³ The original custodian of record was Wellington Davenport.

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

mail chain discussions are exempt from disclosure as attorney-client privileged material pursuant to N.J.S.A. 47:1A-1.1. **However, the Custodian must disclose the following information contained in the e-mail chain:**

- (1) **To:**
- (2) **cc:**
- (3) **From:**
- (4) **Subject:**
- (5) **Closing salutations and electronic signature information**

3. **The Custodian shall comply with paragraph 2 above within five (5) business days from receipt of the Council's Interim Order and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4⁵, to the Executive Director.⁶**
4. Although the original Custodian failed to respond in writing to the Complainant's letter request resulting in a "deemed" denial of the Complainant's letter request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007), the current Custodian timely complied with the Council's June 29, 2010 Interim Order by providing the requested e-mails for an *in camera* examination, and the original Custodian lawfully denied access to the requested May 14, 2009 e-mail chain between and among the Board Attorney (Joseph F. Betley, Esq.), previous School Leader (E. Harper) and Board members pursuant to N.J.S.A. 47:1A-6 because the records are exempt from disclosure as attorney-client privileged material pursuant to N.J.S.A. 47:1A-1.1. However, the Custodian must disclose certain information contained in the e-mail chain. Therefore, it is concluded that the original and current Custodians' 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.

August 26, 2010

Council's Interim Order distributed to the parties.

August 27, 2010

Custodian's response to the Council's Interim Order attaching the following:

- Letter from the Custodian to the Complainant dated August 26, 2010.⁷

⁵ "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."

⁶ Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

⁷ The evidence of record indicates that compliance was prepared on August 26, 2010, but not sent to the Complainant until August 27, 2010.

- May 14, 2009 e-mail chain (with redactions).
- E-mail from the Custodian’s Counsel to the Complainant dated August 27, 2010 attaching a PDF of the redacted records.
- UPS shipment receipt dated August 27, 2010.

The Custodian certifies that on this date, the Custodian’s Counsel forwarded the May 14, 2009 e-mails to the Complainant per the Council’s Interim Order via e-mail and overnight mail.

Analysis

Whether the Custodian complied with the Council’s August 24, 2010 Interim Order?

The Council’s August 24, 2010 Interim Order specifically directed the Custodian to “disclose the following information contained in the e-mail chain:

- (1) To:
- (2) cc:
- (3) From:
- (4) Subject:
- (5) Closing salutations and electronic signature information ...”

Said Order also directed the Custodian to provide certified confirmation of compliance to the GRC’s Executive Director within five (5) business days from receipt of said Order.

On August 27, 2010, or one (1) business day after receipt of the Council’s Interim Order, the Custodian’s Counsel forwarded the records ordered to be disclosed with the appropriate redactions to the Complainant via e-mail and overnight mail. Additionally, the Custodian provided certified confirmation of the Freedom Academy Charter School’s compliance with the Council’s order on the same day to the Executive Director of the GRC.

Therefore, because the Custodian provided the records ordered to be disclosed with appropriate redactions to the Complainant on August 27, 2010, and because the Custodian provided certified confirmation of compliance pursuant to N.J. Court Rule 1:4-4 to the Executive Director within five (5) business days of receiving the Council’s Interim Order, the Custodian has complied with the Council’s August 24, 2010 Interim Order.

Because all issues in this complaint have been resolved, no further adjudication is required.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that because the Custodian provided the records ordered to be disclosed with appropriate redactions to the Complainant on August 27, 2010, and because the Custodian provided certified

confirmation of compliance pursuant to N.J. Court Rule 1:4-4 to the Executive Director within five (5) business days of receiving the Council's Interim Order, the Custodian has complied with the Council's August 24, 2010 Interim Order. Because all issues in this complaint have been resolved, no further adjudication is required.

Prepared By: Frank F. Caruso
Senior Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

September 13, 2010



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

August 24, 2010 Government Records Council Meeting

Miguel Mendes
Complainant

Complaint No. 2009-184

v.

Freedom Academy Charter School (Camden)
Custodian of Record

At the August 24, 2010 public meeting, the Government Records Council ("Council") considered the August 17, 2010 *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 June 29, 2010 Interim Order by providing the Council with the record set forth in Paragraph 4 of the Order within five (5) business days of receiving the Council's Order.
2. The *In Camera* Examination reveals the Custodian has lawfully denied access to the discussions in the requested May 14, 2009 e-mail chain between and among the Board Attorney (Joseph F. Betley, Esq.), previous School Leader (E. Harper) and Board members pursuant to N.J.S.A. 47:1A-6 because the e-mail chain discussions are exempt from disclosure as attorney-client privileged material pursuant to N.J.S.A. 47:1A-1.1. **However, the Custodian must disclose the following information contained in the e-mail chain:**
 - (1) To:
 - (2) cc:
 - (3) From:
 - (4) Subject:
 - (5) Closing salutations and electronic signature information
3. **The Custodian shall comply with paragraph 2 above within five (5) business days from receipt of the Council's Interim Order and simultaneously provide**



certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4¹, to the Executive Director.²

4. Although the original Custodian failed to respond in writing to the Complainant's letter request resulting in a "deemed" denial of the Complainant's letter request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007), the current Custodian timely complied with the Council's June 29, 2010 Interim Order by providing the requested e-mails for an *in camera* examination, and the original Custodian lawfully denied access to the requested May 14, 2009 e-mail chain between and among the Board Attorney (Joseph F. Betley, Esq.), previous School Leader (E. Harper) and Board members pursuant to N.J.S.A. 47:1A-6 because the records are exempt from disclosure as attorney-client privileged material pursuant to N.J.S.A. 47:1A-1.1. However, the Custodian must disclose certain information contained in the e-mail chain. Therefore, it is concluded that the original and current Custodians' 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.

Interim Order Rendered by the
Government Records Council
On The 24th Day of August, 2010

Robin Berg Tabakin, Chair
Government Records Council

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

Stacy Spera, Secretary
Government Records Council

Decision Distribution Date: August 26, 2010

¹ "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."

² Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

***In Camera* Findings and Recommendations of the Executive Director
August 24, 2010 Council Meeting**

**Miguel Mendes¹
Complainant**

GRC Complaint No. 2009-184

v.

**Freedom Academy Charter School (Camden)²
Custodian of Records**

Records Relevant to Complaint: Copies of all personnel meeting minutes, executive session meeting minutes and e-mail correspondence between the Board and Mr. E. Harper (“Mr. Harper”), School Leader, relating to the Complainant’s employment at Freedom Academy Charter School (“School”) during the 2008-2009 school year which led to the non-renewal of the Complainant’s contract.

Request Made: May 21, 2009

Response Made: June 4, 2009

Custodian: Steven Gilmartin³

GRC Complaint Filed: June 5, 2009⁴

Records Submitted for *In Camera* Examination: May 14, 2009 e-mail chain between and among the Board Attorney (Joseph F. Betley, Esq.), previous School Leader (E. Harper) and Board members.

Background

June 29, 2010

Government Records Council’s Interim Order. At the June 29, 2010 public meeting, the Government Records Council (“Council”) considered the June 22, 2010 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’s failure to respond in writing to the Complainant’s letter request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the Complainant’s letter request pursuant to N.J.S.A.

¹ No legal representation listed on record.

² Represented by Joseph F. Betley, Esq. of Capehart & Scatchard, P.A. (Mount Laurel, NJ).

³ The original custodian of record was Wellington Davenport.

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

47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).

2. Because the Complainant's request for personnel meeting minutes and executive session meeting minutes "during the 2008-2009 school year which led to the non-renewal of the Complainant's contract" would require the Custodian to conduct research in order to respond to the request, the Complainant's request is invalid under OPRA. 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' Ass'n v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007).
3. Because the Complainant's OPRA request for e-mail correspondence contains the sender and/or recipient, content of the e-mail and a specific date range, said portion of the OPRA request is valid under OPRA. See Sandoval v. NJ State Parole Board, GRC Complaint No. 2006-167 (October 2008), and Elcavage v. West Milford Township (Passaic), GRC Complaint No. 2009-07 (March 2010).
4. 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 requested May 14, 2009 e-mail chain to determine the validity of the Custodian's assertion that the record contains information which is exempt from disclosure as attorney-client privileged pursuant to N.J.S.A. 47:1A-1.1.
5. **The Custodian must deliver⁵ to the Council in a sealed envelope nine (9) copies of the requested unredacted record (see No. 4 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 record provided is the record 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.**
6. 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.

July 12, 2010

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

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."

July 14, 2010

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

- (1) Nine (9) copies of the requested May 14, 2009 e-mail chain between and among the Board Attorney (Joseph F. Betley, Esq.), previous School Leader (E. Harper) and Board members, and
- (2) Document Index explaining why the requested record is exempt from disclosure as attorney-client privileged material.

The Custodian certified that he is the current custodian but was not the custodian at the time of the Complainant's OPRA request and did not take part in the response made to the Complainant at the time of such request. The Custodian further certified that the e-mails are exempt from disclosure as attorney-client privileged because the e-mails were either drafted by the Freedom Academy Charter School attorney (Joseph F. Betley, Esq.) to the Board members and former School Leader (E. Harper), or the e-mails were directed to Mr. Betley for information or an explanation regarding the subject of the e-mails.

In the document index, the Custodian certified that Evidence Rule 504 states that "... communications between lawyer and his client in the course of that relationship and in professional confidence, are privileged, and a client has a privilege (a) to refuse to disclose such communication, and (b) to prevent his lawyer from disclosing it ...". The Custodian also certifies that the Rule 504 further indicates that in the definitions of that rule, "client" means a person or corporation or other association that, directly or through an authorized representative, consults a lawyer or the lawyer's representative for the purpose of retaining the lawyer or securing legal service or advice from him in his professional capacity. Additionally, the Custodian certifies that in Fellerman v. Bradley, 99 N.J. 493, 499 (1985), the New Jersey Supreme Court indicated that, "[f]or a communication to be privileged it must initially be expressed by an individual in his capacity as a client in conjunction with seeking or receiving legal advice from the attorney in his capacity as such, with the exception that its content remain confidential." Lastly, the Custodian certified that in McGee v. Township of East Amwell, GRC Complaint No. 2007-305 (August 2009), the Council determined that numerous e-mails in which counsel was a recipient were exempt as being protected by the attorney-client privilege. The Custodian certified that the communications were made with the belief that they would remain confidential.

Analysis

Whether the Custodian complied with the Council's June 29, 2010 Interim Order?

At its June 29, 2010 public meeting, the Council determined that 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 requested May 14, 2009 e-mail chain to determine the validity of the Custodian's assertion that the record contains information which is exempt from disclosure as attorney-client privileged pursuant to N.J.S.A. 47:1A-1.1. 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 document, 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 document provided is the document 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 July 19, 2010.

The Custodian provided the GRC with a legal certification, the unredacted record requested for the *in camera* inspection and a document index explaining the Custodian's asserted exemption from disclosure of the record on July 14, 2010. Therefore, the Custodian timely complied with the Council's June 29, 2010 Interim Order.

Whether the Custodian unlawfully denied the Complainant access to the requested May 14, 2009 e-mail chain between and among the Board Attorney (Joseph F. Betley, Esq.), previous School Leader (E. Harper) and Board members?

The Custodian asserts that he lawfully denied the Complainant access to the requested May 14, 2009 e-mail chain between and among the Board Attorney (Joseph F. Betley, Esq.), previous School Leader (E. Harper) and Board members because the e-mails are exempt from disclosure as attorney-client privileged material. Conversely, the Complainant asserts that the Custodian's denial of the May 14, 2009 e-mail chain was unlawful.

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

The attorney-client privilege "recognizes that sound legal advice or advocacy serves public ends and that the confidentiality of communications between client and attorney constitutes an indispensable ingredient of our legal system." Matter of Grand Jury Subpoenas, 241 N.J. Super. 18, 27-8 (App.Div.1989). The attorney-client privilege protects communications between a lawyer and the client made in the course of that professional relationship, and particularly protects information which, if disclosed, would jeopardize the legal position of the client. N.J.S.A. 2A:84A-20; RPC 1.6. The New Jersey Supreme Court has observed that RPC 1.6 "expands the scope of protected information to include all information relating to the representation, regardless of the source or whether the client has requested it be kept confidential or whether disclosure of the information would be

embarrassing or detrimental to the client.” In re Advisory Opinion No. 544 of N.J. Sup. Court, 103 N.J. 399, 406 (1986).

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

The GRC conducted an *in camera* examination on the May 14, 2009 e-mail chain between and among the Board Attorney (Joseph F. Betley, Esq.), previous School Leader (E. Harper) and Board members. The *in camera* examination of the requested record revealed that the discussions in the e-mail chain is exempt from disclosure as attorney-client privileged material because the attorney for the Board rendered advice to the Board members, the former School Leader and responded to questions from the Board members and former School Leader about the advice he rendered. Thus, the Custodian lawfully denied access to the discussions in the May 14, 2009 e-mail chain because the discussions are appropriately exempt from disclosure as attorney-client privileged material. However, the Custodian must disclose the following information contained in the e-mail chain:

- (1) To:
- (2) cc:
- (3) From:
- (4) Subject:
- (5) Closing salutations and electronic signature information

These disclosures are required because OPRA provides that the custodian shall delete or excise [redact] from a copy of the record that portion which the custodian asserts is exempt from access and shall promptly make available a copy of the record. N.J.S.A. 47:1A-5.g. A custodian must always evaluate whether one of the twenty-four (24) exemptions contain in OPRA works to exempt the entire record or simply a portion of the record. In this case, the attorney-client privilege exemption applies to the discussions but not to the entire e-mail. Thus, the Custodian must disclosure the portions of the e-mail chain listed above.

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.

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 original Custodian failed to respond in writing to the Complainant’s letter request resulting in a “deemed” denial of the Complainant’s letter request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007), the current Custodian timely complied with the Council’s June 29, 2010 Interim Order by providing the requested e-mails for an *in camera* examination, and the original Custodian lawfully denied access to the discussion in the requested May 14, 2009 e-mail chain between and among the Board Attorney (Joseph F. Betley, Esq.), previous School Leader (E. Harper) and Board members pursuant to N.J.S.A. 47:1A-6 because the e-mail chain is exempt from disclosure as attorney-client privileged material pursuant to N.J.S.A. 47:1A-1.1. However, the Custodian must disclose certain information contained in the e-mail chain. Therefore, it is concluded that the original and current Custodians’ 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 Custodian has complied with the Council’s June 29, 2010 Interim Order by providing the Council with the record set forth in Paragraph 4 of the Order within five (5) business days of receiving the Council’s Order.
2. The *In Camera* Examination reveals the Custodian has lawfully denied access to the discussions in the requested May 14, 2009 e-mail chain between and among the Board Attorney (Joseph F. Betley, Esq.), previous School Leader (E. Harper)

and Board members pursuant to N.J.S.A. 47:1A-6 because the e-mail chain discussions are exempt from disclosure as attorney-client privileged material pursuant to N.J.S.A. 47:1A-1.1. **However, the Custodian must disclose the following information contained in the e-mail chain:**

- (1) To:**
- (2) cc:**
- (3) From:**
- (4) Subject:**
- (5) Closing salutations and electronic signature information**

3. **The Custodian shall comply with paragraph 2 above within five (5) business days from receipt of the Council's Interim Order and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4⁸, to the Executive Director.⁹**
4. Although the original Custodian failed to respond in writing to the Complainant's letter request resulting in a "deemed" denial of the Complainant's letter request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007), the current Custodian timely complied with the Council's June 29, 2010 Interim Order by providing the requested e-mails for an *in camera* examination, and the original Custodian lawfully denied access to the requested May 14, 2009 e-mail chain between and among the Board Attorney (Joseph F. Betley, Esq.), previous School Leader (E. Harper) and Board members pursuant to N.J.S.A. 47:1A-6 because the records are exempt from disclosure as attorney-client privileged material pursuant to N.J.S.A. 47:1A-1.1. However, the Custodian must disclose certain information contained in the e-mail chain. Therefore, it is concluded that the original and current Custodians' 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 and
Approved By: Catherine Starghill, Esq.
Executive Director

August 17, 2010

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."

⁹ Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.



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

June 29, 2010 Government Records Council Meeting

Miguel Mendes
Complainant

Complaint No. 2009-184

v.

Freedom Academy Charter School (Camden)
Custodian of Record

At the June 29, 2010 public meeting, the Government Records Council (“Council”) considered the June 22, 2010 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’s failure to respond in writing to the Complainant’s letter request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the Complainant’s letter request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).
2. Because the Complainant’s request for personnel meeting minutes and executive session meeting minutes “during the 2008-2009 school year which led to the non-renewal of the Complainant’s contract” would require the Custodian to conduct research in order to respond to the request, the Complainant’s request is invalid under OPRA. 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’ Ass’n v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007).
3. Because the Complainant’s OPRA request for e-mail correspondence contains the sender and/or recipient, content of the e-mail and a specific date range, said portion of the OPRA request is valid under OPRA. See Sandoval v. NJ State Parole Board, GRC Complaint No. 2006-167 (October 2008), and Elcavage v. West Milford Township (Passaic), GRC Complaint No. 2009-07 (March 2010).



4. 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 requested May 14, 2009 e-mail chain to determine the validity of the Custodian's assertion that the record contains information which is exempt from disclosure as attorney-client privileged pursuant to N.J.S.A. 47:1A-1.1.
5. **The Custodian must deliver¹ to the Council in a sealed envelope nine (9) copies of the requested unredacted record (see No. 4 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 record provided is the record 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.**
6. 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 29th Day of June, 2010

Robin Berg Tabakin, Chair
Government Records Council

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

Charles A. Richman, Secretary
Government Records Council

Decision Distribution Date: July 12, 2010

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

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

³ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
June 29, 2010 Council Meeting**

**Miguel Mendes¹
Complainant**

GRC Complaint No. 2009-184

v.

**Freedom Academy Charter School (Camden)²
Custodian of Records**

Records Relevant to Complaint: Copies of all personnel meeting minutes, executive session meeting minutes and e-mail correspondence between the Board and Mr. E. Harper (“Mr. Harper”), School Leader, relating to the Complainant’s employment at Freedom Academy Charter School (“School”) during the 2008-2009 school year which led to the non-renewal of the Complainant’s contract.

Request Made: May 21, 2009

Response Made: June 4, 2009

Custodian: Steven Gilmartin³

GRC Complaint Filed: June 5, 2009⁴

Background

May 21, 2009

Complainant’s Open Public Records Act (“OPRA”) request. The Complainant requests the records relevant to this complaint listed above in a letter referencing OPRA.

June 4, 2009

Custodian’s response to the OPRA request. The Custodian responds in writing to the Complainant’s OPRA request on the ninth (9th) business day following receipt of such request.⁵ The Custodian states that access to personnel committee meeting minutes is denied because the Custodian’s Counsel, who was present during the relevant meetings, gave advice to the committee concerning the above topics; therefore, the minutes responsive are exempt from disclosure as attorney-client privileged.

The Custodian states that access to the requested executive session meeting minutes is also denied for the reason stated above.

¹ No legal representation listed on record.

² Represented by Joseph F. Betley, Esq. of Capehart & Scatchard, P.A. (Mount Laurel, NJ).

³ The original custodian of record was Wellington Davenport.

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

⁵ The Complainant did not receive the Custodian’s response until June 6, 2009, or one (1) day after filing a Denial of Access Complaint with the GRC.

Finally, the Custodian states that access to the requested e-mail correspondence between the Board of Trustees and Mr. Harper is denied for the following reasons:

- The e-mails contain intra-agency or inter-agency advisory, consultative or deliberative (“ACD”) material
- The e-mails fall under the personnel file exemption.
- The e-mails contain attorney-client privileged material because Counsel was included in all e-mail exchanges between/among the Board of Trustee Members and Mr. Harper related to Complainant’s employment.

June 5, 2009

Denial of Access Complaint filed with the Government Records Council (“GRC”) attaching the Complainant’s letter request dated May 21, 2009.

The Complainant states that, because the School does not have an official OPRA request form, the Complainant hand delivered a letter request for records pursuant to OPRA to the School on May 21, 2009. The Complainant states that as of this date, the Complainant has not received a response from the Custodian.

The Complainant asserts that the Custodian’s failure to respond in writing within the statutorily mandated time frame has resulted in a violation of N.J.S.A. 47:1A-5.f. (adoption of a form), N.J.S.A. 47:1A-5.i. (failure to respond within seven (7) business days) and N.J.S.A. 47:1A-5.j. (failure to post the appeals process publically).

The Complainant does not agree to mediate this complaint.

June 6, 2009

Letter from the Complainant to the Custodian. The Complainant states that he is responding to the Custodian’s June 4, 2009 response to the Complainant’s OPRA request. The Complainant notes that the Custodian failed to inform the Complainant of the appeals process afforded under OPRA.

The Complainant states that he has not requested to review Counsel’s advice to the Board of Trustees nor has he asked the School to violate the attorney-client privilege exemption. The Complainant requests that the Custodian review the relevant portion of OPRA regarding redactions. N.J.S.A. 47:1A-5.g.

June 8, 2009

E-mail from the Complainant to the Custodian. The Complainant requests clarification of the Custodian’s written response to the Complainant’s OPRA request; specifically, the Complainant requests clarification of the ACD exemption cited by the Custodian.

The Complainant states that although the Board of Trustees is considered to be an “agency,” the Complainant’s request did not seek ACD material or recommendations, draft documents, proposals, suggestions or other subjective documents. The Complainant states that the decision to not renew the Complainant’s contract of employment has already been made public and voted on; therefore, the ACD exemption no longer applies.

June 11, 2009

Letter from the Custodian to the Complainant. The Custodian states that the basis for denying access to the requested records was outlined in the Custodian's response to the request. The Custodian provides information regarding the Complainant's options for appealing a denial of access.

June 24, 2009

E-mail from the GRC to the Complainant attaching an amended Denial of Access Complaint form. The GRC states that, pursuant to the Complainant's request, attached is a form for an amended Denial of Access Complaint. The GRC requests that the Complainant return the completed amended Denial of Access Complaint form with any supporting documentation by June 29, 2009.⁶

June 29, 2009

Complainant's amended Denial of Access Complaint with the following attachments:

- Letter from the Custodian to the Complainant dated June 4, 2009.
- Letter from the Complainant to the Custodian dated June 6, 2009.
- E-mail from the Complainant to the Custodian dated June 8, 2009.
- Letter from the Custodian to the Complainant dated June 11, 2009.

The Complainant states that he is filing the instant amended Denial of Access Complaint to include correspondence that occurred following the filing of his initial complaint.

The Complainant states that he received the Custodian's written response dated June 4, 2009 via U.S. mail on June 6, 2009. The Complainant states that the Custodian denied access to the requested records for reasons for which the Complainant believes are invalid given that the Board had already made their decision not to renew the Complainant's employment contract.

Additionally, the Complainant states that the Custodian failed to provide information regarding the Complainant's options for appealing the denial of access.

September 9, 2009

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

September 14, 2009

E-mail from the Custodian's Counsel to the GRC. Counsel requests an extension of time to submit the requested SOI.

⁶ The Complainant requested the amended Denial of Access Complaint form in a telephone conversation earlier in the day.
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September 15, 2009

E-mail from the GRC to the Custodian’s Counsel. The GRC grants an extension of time of five (5) business days or until September 23, 2009 to submit the requested SOI.

September 23, 2009

Custodian’s SOI with the following attachments:

- Complainant’s letter request dated May 21, 2009.
- Letter from the Custodian to the Complainant dated June 4, 2009.
- Letter from the Custodian to the Complainant dated June 11, 2009.

The Custodian certifies that records responsive to the request were destroyed in accordance with the Records Destruction Schedule established and approved by New Jersey Department of State, Division of Archives and Records Management (“DARM”).⁷

The Custodian certifies that the School received the Complainant’s letter request on May 21, 2009. The Custodian certified that he responded to the Complainant’s letter request on June 4, 2009 denying access to the Complainant’s request. The Custodian certifies that he sent a second letter to the Complainant on June 11, 2009 advising the Complainant of his options for filing an appeal of a denial of access complaint.

The Custodian identifies two documents responsive to the Complainant’s letter request:

Record Responsive	General Nature Description of Record	Legal Basis for Denial of Access
May 14, 2009 e-mails between Ms. Wright, Mr. Moxie, Ms. Bazelon, Ms. Gonzalez, Mr. Davenport, Mr. Harper and the Custodian’s Counsel.	E-mail chain in response to an e-mail sent by the Custodian’s Counsel regarding non-renewal letters.	Attorney-client privileged record.
April 28, 2009 Personnel Committee Meeting	Meeting in which the Custodian’s Counsel attended and gave extensive advice and opinions.	Attorney-client privileged record.

Further, the Custodian’s Counsel submitted a legal brief in support of the School’s position. Counsel avers that access to the records responsive to the Complainant’s letter request was denied because the records are protected by attorney-client privilege. Counsel avers that he provided opinions and advice to the Board at the April 28, 2009 personnel meeting; therefore, the attorney-client privilege attaches to those communications. Additionally, Counsel argues that he was a recipient of all communications between the Board and Mr. Harper because both sought Counsel’s advice, opinions and analysis of the law. Counsel avers that these communications are

⁷ The Custodian also certifies that all records responsive have been located.
Miguel Mendes v. Freedom Academy Charter School (Camden), 2009-184 – Findings and Recommendations of the Executive Director

also protected by the attorney-client privilege. Counsel further states that there were no executive session minutes in which the Complainant was discussed.

Counsel states that the Rules of Evidence provide that:

“...communications between lawyer and his client in the course of that relationship and in professional confidence, are privileged, and a client has a privilege (a) to refuse to disclose such communications, and (b) to prevent his lawyer from disclosing it ...” *N.J.R.E.* 504(1).

Counsel states that Rules of Evidence further provide that:

“(3) Definitions. As used in this rule (a) "client" means a person or corporation or other association that, directly or through an authorized representative, consults a lawyer or the lawyer's representative for the purpose of retaining the lawyer or securing legal service or advice from him in his professional capacity..” *N.J.R.E.* 504(3).

Counsel states that in Fellerman v. Bradley, 99 N.J. 493, 499 (1985), the court indicated that “[f]or communication to be privileged it must initially be expressed by an individual in his capacity as a client in conjunction with seeking or receiving legal advice from the attorney in his capacity as such, with the expectation that its contents remain confidential.” Further, Counsel states that in McGee v. Township of East Amwell, GRC Complaint No. 2007-305 (August 2009), the Council determined that numerous e-mails in which counsel was a recipient were exempt as being protected by the attorney-client privilege.

Counsel argues that in the instant complaint, he was present at the personnel meeting held on April 28, 2009 and gave extensive advice and opinions. Additionally, Counsel argues that he was the recipient of the e-mails identified as responsive to the Complainant’s request; in which Counsel’s advice was requested on a myriad of issues relating to the Complainant. Counsel further argues that the request of the Board and Mr. Harper were made with the expectation that the advice would remain confidential. Counsel asserts that, based on the foregoing, the School stands by its original reasons for denying access to the records responsive to the Complainant’s May 21, 2009 OPRA request.

Finally, Counsel notes that the non-renewal of the Complainant’s employment was discussed during the executive session held on April 28, 2009. Counsel states that he was present at the time of the meeting. Counsel avers that the minutes from the April 28, 2009 executive session meeting have not been approved by the Board at this time. Counsel argues that regardless of the approval status of the minutes, such would still be protected under the attorney-client privilege exemption because Counsel provided extensive advice and opinions during said meeting.

October 7, 2009

E-mail from the Complainant to the GRC. The Complainant requests a chance to respond to the SOI because of several inconsistencies. The Complainant asserts that the

list of records responsive submitted in the SOI does not contain several records the Complainant believes are responsive. Further, the Complainant argues that the SOI does not include all of the correspondence relevant to this complaint.⁸

October 7, 2009

E-mail from the GRC to the Complainant. The GRC states that *N.J.A.C. 5:105-2* does not expressly afford additional responses following the SOI. The GRC advises that, as a matter of practice, any additional submissions which provide new information or evidence relevant to the instant complaint will be considered.⁹

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 also provides that:

“[i]f the custodian is unable to comply with a request for access, the custodian shall indicate the specific basis therefor on the request form and promptly return it to the requestor. The custodian shall sign and date the form and provide the requestor with a copy thereof ...” N.J.S.A. 47:1A-5.g.

Further, OPRA provides that:

“[u]nless a shorter time period is otherwise provided by statute, regulation, or executive order, a custodian of a government record shall grant access

⁸ The Complainant also asserted that the School was the subject of a fiscal investigation and that the School did not approve a legal services contract in public session. These assertions are irrelevant to the adjudication of the instant complaint, which is focused on whether an unlawful denial of access to government records requested pursuant to OPRA has occurred.

⁹ Counsel subsequently submitted a letter to the GRC on October 7, 2009 requesting that the Complainant be prohibited from providing a reply that contains information not relevant to this complaint. The Complainant did not provide any additional correspondence.

... or deny a request for access ... as soon as possible, but *not later than seven business days after receiving the request* ... In the event a custodian fails to respond within seven business days after receiving a request, *the failure to respond shall be deemed a denial of the request* ...” (Emphasis added.) N.J.S.A. 47:1A-5.i.

OPRA 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.

The GRC first turns to the issue of whether the Custodian responded in a timely manner.

OPRA mandates that a custodian must either grant or deny access to requested records within seven (7) business days from receipt of said request. N.J.S.A. 47:1A-5.i. As also prescribed under N.J.S.A. 47:1A-5.i., a custodian’s failure to respond within the required seven (7) business days results in a “deemed” denial. Further, a custodian’s response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5.g.¹⁰ Thus, a custodian’s failure to respond in writing to a complainant’s OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).

In the instant complaint, the Custodian responded in writing on the ninth (9th) business day after receipt of the Complainant’s letter request, or two (2) after the expiration of the statutorily mandated seven (7) business day time frame.

Therefore, the Custodian’s failure to respond in writing to the Complainant’s letter request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the Complainant’s letter request pursuant to N.J.S.A. 47:1A-5.g.,

¹⁰ It is the GRC’s position that a custodian’s written response either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, even if said response is not on the agency’s official OPRA request form, is a valid response pursuant to OPRA.

N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).

The GRC next turns to the issue of whether the Complainant's letter request is valid under OPRA. The Complainant's letter request sought "[c]opies of all personnel meeting minutes, executive session meeting minutes and e-mail correspondences between the Board and Mr. E. Harper ("Mr. Harper"), School Leader, relating to the Complainant's employment at Freedom Academy Charter School ("School") during the 2008-2009 school year which led to the non-renewal of the Complainant's contract."

The GRC will first examine whether the portion of the request for "personnel meeting minutes" and "executive session meeting minutes" is a valid request under OPRA.

In response to the Complainant's request for "personnel meeting minutes [and] executive session meeting minutes ... relating to the Complainant's employment ... during the 2008-2009 school year which led to the non-renewal of the Complainant's contract", the Custodian denied access in writing to such records stating that they were exempt from disclosure because they contained attorney-client privileged material. The Custodian's Counsel subsequently stated that the records responsive consisted of personnel meeting minutes dated April 28, 2009 and unapproved executive session meeting minutes also dated April 28, 2009. However, the Complainant's letter request for "personnel meeting minutes" and "executive session meeting minutes" would require the Custodian to search all of the personnel and executive session meeting minutes in order to identify those records which related to "the Complainant's employment ... during the 2008-2009 school year which led to the non-renewal of the Complainant's contract." The Complainant's request for such records is therefore invalid under OPRA.

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). The Court further held that "[u]nder OPRA, *agencies are required to disclose only 'identifiable' government records* not otherwise exempt. Wholesale requests for general information to be analyzed, collated and compiled by the responding government entity are not encompassed therein. In short, OPRA does not countenance open-ended searches of an agency's files." (Emphasis added.) *Id.* at 549.

In determining that MAG Entertainment's request for "all documents or records" from the Division of Alcoholic Beverage Control pertaining to selective enforcement was invalid under OPRA, the Appellate Division noted that:

"[m]ost 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.*

The Appellate Division later noted that "[r]esearch is not among the custodian's responsibilities" under OPRA. New Jersey Builders' Ass'n v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 177 (App. Div. 2007).

In the instant matter, the Complainant's request for "personnel meeting minutes [and] executive session meeting minutes ... relating to the Complainant's employment ... during the 2008-2009 school year which led to the non-renewal of the Complainant's contract" would require the Custodian to manually search through all of the agency's files, analyze such files for records containing the information sought by the Complainant, identify the particular records, determine whether the records contained information that led to the non-renewal of the Complainant's contract and redact any contents of such records that may be exempt from disclosure before providing such record to the Complainant. As the Appellate Division held in MAG, *supra*, custodians are not required to conduct research in order to respond to a valid OPRA request.

Therefore, because the Complainant's request for personnel meeting minutes and executive session meeting minutes "...during the 2008-2009 school year which led to the non-renewal of the Complainant's contract" would require the Custodian to conduct research in order to respond to the request, the Complainant's request is invalid under OPRA. MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005); Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 2005); New Jersey Builders' Ass'n v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 177 (App. Div. 2007).¹¹

The GRC will next examine whether the portion of the Complainant's request for "e-mail correspondence" is valid under OPRA.

In response to the Complainant's request for "...e-mail correspondence between the Board and Mr. E. Harper ("Mr. Harper"), School Leader, relating the Complainant's employment ... during the 2008-2009 school year which led to the non-renewal of the Complainant's contract" the Custodian denied access to the requested e-mails, stating that they were ACD in nature, are exempt from disclosure as personnel records and contain attorney-client privileged material. The Custodian's Counsel subsequently identified in the SOI an e-mail chain dated May 14, 2009 as responsive to the Complainant's request.

¹¹ The GRC notes that although the Custodian identified records responsive to the Complainant's request for personnel and executive session meeting minutes, the question of whether these records are subject to disclosure pursuant to OPRA is moot because this portion of the request is invalid.

The GRC has previously set forth a standard for determining whether a request for e-mail is valid under OPRA. 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.*

The GRC recently undertook the task of expanding on Sandoval in Elcavage v. West Milford Township (Passaic), GRC Complaint No. 2009-07 (March 2010). In that complaint, the Complainant requested electronic copies of all e-mails from Bettina Bieri’s township account from January 1, 2008 to June 17, 2008. The GRC stated in its analysis that in expanding on Sandoval:

“... an OPRA request for an e-mail or e-mails shall therefore focus upon the following four (4) characteristics:

- Content and/or subject
- Specific date or range of dates
- Sender
- Recipient

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 and (2) the specific date or range of dates during which the e-mail was transmitted or the e-mails were transmitted. Additionally, a valid e-mail request must identify the sender and/or the recipient thereof.”

The GRC found that, based on the above standard, the Complainant’s request to be invalid because it failed to identify the content and/or subject of the e-mails sought.

In the matter currently before the Council, the Complainant identified the e-mail correspondence sought by sender and/or recipient as well as content. Additionally, the Complainant specified a date range in which the e-mails sought would have been created, *i.e.*, the 2008-2009 school year. As such, because the Complainant’s OPRA request contains the four (4) qualifying factors set forth in Elcavage, *supra*, said request is valid under OPRA.

Accordingly, because the Complainant's OPRA request for e-mail correspondence contains the specific sender and/or recipient, content of the e-mail and a specific date range, said portion of the OPRA request is valid under OPRA. See Sandoval, *supra*, and Elcavage, *supra*.

The Custodian initially responded to this portion of the Complainant's OPRA request in writing denying access to e-mail correspondence stating that such e-mails were ACD in nature, are exempt from disclosure as personnel records and contain attorney-client privileged material. Subsequently, the Custodian's Counsel identified in the SOI an e-mail chain dated May 14, 2009 as responsive to the Complainant's OPRA request for e-mail correspondence; however, Counsel contended that said record was exempt from disclosure because it contained attorney-client privileged material. Counsel argued that he was the recipient of the e-mails identified as responsive to the Complainant's request, in which Counsel's advice was requested on a myriad of issues relating to the Complainant. Counsel further argues that the request of the Board and Mr. Harper were made with the expectation that the advice would remain confidential.

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 GRC¹² 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*

¹² Paff v. NJ Department of Labor, Board of Review, GRC Complaint No. 2003-128 (October 2005). Miguel Mendes v. Freedom Academy Charter School (Camden), 2009-184 – Findings and Recommendations of the Executive Director

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 requested May 14, 2009 e-mail chain to determine the validity of the Custodian's assertion that the record contains information which is exempt from disclosure as attorney-client privileged pursuant to N.J.S.A. 47:1A-1.1.

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's failure to respond in writing to the Complainant's letter request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's letter request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).
2. Because the Complainant's request for personnel meeting minutes and executive session meeting minutes "during the 2008-2009 school year which led to the non-renewal of the Complainant's contract" would require the Custodian to conduct research in order to respond to the request, the Complainant's request is invalid under OPRA. 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' Ass'n v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007).
3. Because the Complainant's OPRA request for e-mail correspondence contains the sender and/or recipient, content of the e-mail and a specific date range, said portion of the OPRA request is valid under OPRA. *See* Sandoval v. NJ State Parole Board, GRC Complaint No. 2006-167 (October 2008), and Elcavage v. West Milford Township (Passaic), GRC Complaint No. 2009-07 (March 2010).
4. 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 requested May 14, 2009 e-mail chain to determine the validity of the

Custodian's assertion that the record contains information which is exempt from disclosure as attorney-client privileged pursuant to N.J.S.A. 47:1A-1.1.

5. **The Custodian must deliver¹³ to the Council in a sealed envelope nine (9) copies of the requested unredacted record (see No. 4 above), a document or redaction index¹⁴, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4¹⁵, that the record provided is the record 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.**
6. 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

June 22, 2010

¹³ 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.

¹⁴ The document or redaction index should identify the document and/or each redaction asserted and the lawful basis for the denial.

¹⁵ "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."