



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

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

LORI GRIFA
Commissioner

FINAL DECISION

September 27, 2011 Government Records Council Meeting

Jnanendra P. Ray
Complainant

Complaint No. 2009-185

v.

Freedom Academy Charter School (Camden)
Custodian of Record

At the September 27, 2011 public meeting, the Government Records Council (“Council”) considered the August 23, 2011 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. Because the Custodian provided the records ordered to be disclosed with appropriate redactions to the Complainant on May 31, 2011, 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 May 24, 2011 Interim Order.
2. The Council amends paragraph No. 1 of the Council’s May 24, 2011 Interim Order to reflect that the current Custodian did in fact comply with the Council’s August 24, 2010 Interim Order as follows:

“The Custodian has complied with the Council’s August 24, 2010 Interim Order by providing the Council with all records set forth in Paragraph 5 of the Order within five (5) business days of receiving the Council’s Order. Specifically, the Custodian provided the GRC with a legal certification, nine (9) copies of the unredacted records requested for the *in camera* inspection and a document index within the time required on August 31, 2010. Therefore, the Custodian complied with the Council’s August 24, 2010 Interim Order.”

3. The original Custodian’s failure to respond in writing to the Complainant’s May 21, 2009 OPRA request resulted in a “deemed” denial 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 (January 2010). Further, in the Council’s May 24, 2011 Interim Order, the current Custodian was ordered to disclose certain information contained in the e-mail chains responsive to the Complainant’s OPRA request. However, the original Custodian lawfully denied access to the discussion portion 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 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 and the current Custodian timely complied with both the Council's August 24, 2010 and May 24, 2011 Interim Orders. Additionally, the evidence of record does not indicate that the Custodians' violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that the 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.

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 27th Day of September, 2011

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: October 3, 2011

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
September 27, 2011 Council Meeting**

Jnanendra P. Ray¹
Complainant

GRC Complaint No. 2009-185

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 Freedom Academy Charter School Board (“Board”) and Mr. E. Harper, School Leader, regarding the following topics:

- 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.
- Board resolutions and approved meeting minutes regarding the Complainant’s placement on Administrative Leave effective December 17, 2008.
- The Complainant’s re-instatement letter.
- The Rice notice served to the Complainant on January 27, 2009.
- The Rice notice served to the Complainant on April 6, 2009.

Request Made: May 21, 2009

Response Made: June 4, 2009

Custodian: Steven Gilmartin³

GRC Complaint Filed: June 3, 2009⁴

Background

May 24, 2011

Government Records Council’s (“Council”) Interim Order. At its May 24, 2011 public meeting, the 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, found that:

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.

1. The Custodian has not complied with the Council's August 24, 2010 Interim Order by providing the Council with all records set forth in Paragraph 5 of the Order within five (5) business days of receiving the Council's Order. The Custodian provided the GRC with a legal certification, only one (1) copy of the unredacted records requested for the *in camera* inspection and a document index within the time required on August 31, 2010. Therefore, the Custodian did not fully comply with the Council's August 24, 2010 Interim Order because he failed to provide the nine (9) copies of the unredacted records as ordered by the Council.
2. The Custodian lawfully denied access to the e-mail discussions because said discussions are exempt from disclosure as attorney-client privilege and/or as advisory, consultative or deliberative material pursuant to N.J.S.A. 47:1A-1.1. Specifically, the e-mail discussions involve the School Board members requesting and/or receiving legal advice from the School attorney or the members' deliberations over how to handle personnel or administrative matters. Therefore, the e-mail discussions are exempt from disclosure under OPRA.
3. **On the basis of the Council's determination in this matter, the Custodian must disclose all other portions of the requested e-mails to the Complainant (i.e. sender, recipients, date, time, subject, and closing salutations).**
4. **The Custodian must comply with this order 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.**
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 26, 2011

Council's Interim Order distributed to the parties.

May 31, 2011

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

- Letter from the Custodian's Counsel to the GRC dated August 27, 2010.
- Letter from the Custodian to the Complainant dated May 31, 2011.
- E-mail from the Custodian's Counsel to the Complainant dated May 31, 2011 attaching a PDF of the redacted records.
- Two (2) UPS shipment receipts dated May 31, 2011.

The Custodian certifies that on May 31, 2011, the Custodian's Counsel forwarded the responsive e-mails with redactions to the Complainant via e-mail and overnight UPS per the Council's Interim Order. The Custodian certifies that attached is a copy of both the e-mail and letter sent to the Complainant.

Further, the Custodian's Counsel notes that the Council's Interim Order states that only one (1) copy of the requested e-mails was submitted to the GRC. Counsel states that his records show that nine (9) copies were submitted with the cover letter dated August 27, 2010. Counsel states that a copy of said letter is attached for the GRC's review.

Analysis

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

The Council's May 24, 2011 Interim Order specifically directed the Custodian to "... disclose all other portions of the requested e-mails to the Complainant (i.e. sender, recipients, date, time, subject, and closing salutations)." 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 May 31, 2011, or three (3) business days after receipt of the Council's Interim Order, the Custodian's Counsel forwarded to the Complainant via e-mail and overnight mail the records ordered to be disclosed with the appropriate redactions. Additionally, the Custodian provided certified confirmation of 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 May 31, 2011, 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 May 24, 2011 Interim Order.

The GRC acknowledges that the Custodian's Counsel disputed paragraph No. 1 of the Conclusions and Recommendations of the Council's May 24, 2011 Interim Order. Subsequent to the mailing date of the Council's decision, the other (8) copies of the requested *in camera* documents were located.

Therefore, the Council amends paragraph No. 1 to reflect that the current Custodian did in fact comply with the Council's August 24, 2010 Interim Order as follows:

"The Custodian has complied with the Council's August 24, 2010 Interim Order by providing the Council with all records set forth in Paragraph 5 of the Order within five (5) business days of receiving the Council's Order. Specifically, the Custodian provided the GRC with a legal certification, nine (9) copies of the unredacted records requested for the *in camera* inspection and a document index within the time required on August 31,

2010. Therefore, the Custodian complied with the Council's August 24, 2010 Interim 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.

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).

The original Custodian's failure to respond in writing to the Complainant's May 21, 2009 OPRA request resulted in a "deemed" denial 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 (January 2010). Further, in the Council's May 24, 2011 Interim Order, the current Custodian was ordered to disclose certain information contained in the e-mail chains responsive to the Complainant's OPRA request. However, the original Custodian lawfully denied access to the discussion portion 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 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 and the current Custodian timely complied with both the Council's

August 24, 2010 and May 24, 2011 Interim Orders. Additionally, the evidence of record does not indicate that the Custodians' violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that the 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. Because the Custodian provided the records ordered to be disclosed with appropriate redactions to the Complainant on May 31, 2011, 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 May 24, 2011 Interim Order.
2. The Council amends paragraph No. 1 of the Council's May 24, 2011 Interim Order to reflect that the current Custodian did in fact comply with the Council's August 24, 2010 Interim Order as follows:

“The Custodian has complied with the Council's August 24, 2010 Interim Order by providing the Council with all records set forth in Paragraph 5 of the Order within five (5) business days of receiving the Council's Order. Specifically, the Custodian provided the GRC with a legal certification, nine (9) copies of the unredacted records requested for the *in camera* inspection and a document index within the time required on August 31, 2010. Therefore, the Custodian complied with the Council's August 24, 2010 Interim Order.”

3. The original Custodian's failure to respond in writing to the Complainant's May 21, 2009 OPRA request resulted in a “deemed” denial 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 (January 2010). Further, in the Council's May 24, 2011 Interim Order, the current Custodian was ordered to disclose certain information contained in the e-mail chains responsive to the Complainant's OPRA request. However, the original Custodian lawfully denied access to the discussion portion 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 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 and the current Custodian timely complied with both the Council's August 24, 2010 and May 24, 2011 Interim Orders. Additionally, the evidence of record does not indicate that the Custodians' violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that the 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 By: Frank F. Caruso
Senior Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

August 23, 2011



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

Jnanendra P. Ray
Complainant

Complaint No. 2009-185

v.

Freedom Academy Charter School (Camden)
Custodian of Record

At the May 24, 2011 public meeting, the Government Records Council (“Council”) considered the May 17, 2011 *In Camera* Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian has not complied with the Council’s August 24, 2010 Interim Order by providing the Council with all records set forth in Paragraph 5 of the Order within five (5) business days of receiving the Council’s Order. The Custodian provided the GRC with a legal certification, only one (1) copy of the unredacted records requested for the *in camera* inspection and a document index within the time required on August 31, 2010. Therefore, the Custodian did not fully comply with the Council’s August 24, 2010 Interim Order because he failed to provide the nine (9) copies of the unredacted records as ordered by the Council.
2. The Custodian lawfully denied access to the e-mail discussions because said discussions are exempt from disclosure as attorney-client privilege and/or as advisory, consultative or deliberative material pursuant to N.J.S.A. 47:1A-1.1. Specifically, the e-mail discussions involve the School Board members requesting and/or receiving legal advice from the School attorney or the members’ deliberations over how to handle personnel or administrative matters. Therefore, the e-mail discussions are exempt from disclosure under OPRA.
3. **On the basis of the Council’s determination in this matter in the table below, the Custodian must disclose all other portions of the requested e-mails to the Complainant (i.e. sender, recipients, date, time, subject, and closing salutations).**
4. **The Custodian must comply with this order 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.**



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.

Record Number	Record Name/Date	Description of Record	Custodian's Explanation/ Citation for Non-disclosure	Findings of the <i>In Camera</i> Examination¹
1.	April 7, 2009 e-mails between Mr. Moxie, Ms. Wright, Ms. Bazelon, Mr. Davenport, Mr. Harper and Mr. Betley, Esq.	E-mail chain regarding Rice Notice in which Custodian's Counsel advice and opinions were requested.	These e-mails are exempt from disclosure under the attorney-client privilege pursuant to <u>N.J.S.A. 47:1A-1.1.</u> and Evidence Rule 504.	This e-mail chain discussion is exempt under the attorney-client privilege pursuant to <u>N.J.S.A. 47:1A-1.1.</u> as it involves Board members requesting legal advice on employment and Open Public Meetings Act issues from the School attorney and that attorney providing said advice.
2.	March 27, 2009 e-mails between Mr. Moxie, Ms. Wright, Ms. Bazelon, Ms. Gonzalez, Mr. Davenport, Mr. Harper and Mr. Betley, Esq.	E-mail chain regarding the Complainant's work performance.	This e-mail is exempt from disclosure under the attorney-client privilege pursuant to <u>N.J.S.A. 47:1A-1.1.</u> and Evidence Rule 504.	This e-mail discussion is exempt from disclosure as advisory, consultative or deliberative material pursuant to <u>N.J.S.A. 47:1A-1.1.</u> because Board members

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.

				are contemplating an employment issue. This discussion is part of the deliberative process.
3.	February 11, 2009 e-mail between Mr. Harper, Ms. Wright, Ms. Bazelon, Mr. Dougherty and Mr. Betley, Esq.	E-mail from Mr. Harper regarding the Complainant's bonus and requesting information regarding compliance with approved policy and procedures. Responded to by the Custodian's Counsel.	These e-mails are exempt from disclosure under the attorney-client privilege pursuant to <u>N.J.S.A. 47:1A-1.1.</u> and Evidence Rule 504.	This e-mail discussion is exempt under the attorney-client privilege pursuant to <u>N.J.S.A. 47:1A-1.1.</u> as it involves Board members requesting legal advice on employment and administrative issues from the School attorney and that attorney providing said advice. Additionally, this e-mail discussion is exempt from disclosure as advisory, consultative or deliberative material pursuant to <u>N.J.S.A. 47:1A-1.1.</u> because Board members are contemplating an employment issue. This discussion is part of the deliberative process.
4.	January 26, 2009 e-mail between Ms. Wright, Mr. Dougherty, Ms. Bazelon, Mr. Harper and Mr. Betley, Esq.	E-mail from Ms. Wright in response to e-mails from the Custodian's Counsel and requesting an opinion from same.	This e-mail is exempt from disclosure under the attorney-client privilege pursuant to <u>N.J.S.A. 47:1A-1.1.</u> and	This e-mail discussion is exempt under the attorney-client privilege pursuant to <u>N.J.S.A. 47:1A-1.1.</u> as it involves Board members requesting legal

			Evidence Rule 504.	advice on employment and administrative issues from the School attorney and that attorney providing said advice.
5.	January 24, 2009 e-mail between Ms. Wright, Ms. Bazelon, Mr. Dougherty, Mr. Davenport, Mr. Harper and Mr. Betley, Esq.	E-mail from Ms. Wright regarding Rice Notice and requesting opinion and advice from the Custodian's Counsel.	These e-mails are exempt from disclosure under the attorney-client privilege pursuant to <u>N.J.S.A. 47:1A-1.1.</u> and Evidence Rule 504.	This e-mail discussion is exempt from disclosure as advisory, consultative or deliberative material pursuant to <u>N.J.S.A. 47:1A-1.1.</u> because Board members are contemplating an employment issue. This discussion is part of the deliberative process. Additionally, a Board member is requesting legal advice from the School Board attorney making this discussion exempt from disclosure as attorney-client privilege pursuant to <u>N.J.S.A. 47:1.1.</u>
6.	May 14, 2009 e-mails between Ms. Wright, Mr. Moxie, Ms. Bazelon, Mr. Gonzalez, Mr. Davenport, Mr. Harper and Mr. Betley, Esq.	E-mail chain in response to an e-mail sent by the Custodian's Counsel regarding non-renewal letters.	These e-mails are exempt from disclosure under the attorney-client privilege pursuant to <u>N.J.S.A. 47:1A-1.1.</u> and Evidence Rule 504.	This e-mail discussion is exempt under the attorney-client privilege pursuant to <u>N.J.S.A. 47:1A-1.1.</u> as it involves Board members receiving legal advice on employment and administrative

				issues from the School attorney.
7.	March 27, 2009 e-mail between Ms. Gonzalez, Ms. Wright, Mr. Moxie, Ms. Bazelon, Mr. Davenport and Mr. Harper.	This e-mail chain is a duplicate of #2 above as indicated in the Custodian's certification.	This e-mail chain is a duplicate of #2 above as indicated in the Custodian's certification.	This e-mail chain is a duplicate of #2 above as indicated in the Custodian's certification.

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 26, 2011

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

***In Camera* Findings and Recommendations of the Executive Director
May 24, 2011 Council Meeting**

**Jnanendra P. Ray¹
Complainant**

GRC Complaint No. 2009-185

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 Freedom Academy Charter School Board (“Board”) and Mr. E. Harper, School Leader, regarding the following topics:

- 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.
- Board resolutions and approved meeting minutes regarding the Complainant’s placement on Administrative Leave effective December 17, 2008.
- The Complainant’s re-instatement letter.
- The Rice notice served to the Complainant on January 27, 2009.
- The Rice notice served to the Complainant on April 6, 2009.

Request Made: May 21, 2009

Response Made: June 4, 2009

Custodian: Steven Gilmartin³

GRC Complaint Filed: June 3, 2009⁴

Records Submitted for *In Camera* Examination: Seven (7) e-mails between the Freedom Academy Charter School Attorney, Board Members, and the previous School Leader regarding various issues.

Background

August 24, 2010

Government Records Council’s Interim Order. At the August 24, 2010 public meeting, the Government Records Council (“Council”) considered the August 17, 2010 Executive Director’s Findings and Recommendations and all related documentation

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.

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. 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 regarding the following topics: "... during the 2008-2009 school year which led to the non-renewal of the Complainant's contract ... [b]oard resolutions and approved meeting minutes regarding the Complainant's placement on Administrative Leave effective December 17, 2008 ... [t]he Complainant's re-instatement letter ... [t]he Rice notice served to the Complainant on January 27, 2009 [and] [t]he Rice notice served to the Complainant on April 6, 2009," 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).⁵
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 following e-mails to determine the validity of the Custodian's assertion that the record contains information which is exempt from disclosure as attorney-client privileged and advisory, consultative or deliberative pursuant to N.J.S.A. 47:1A-1.1:
 - E-mail between Ms. Wright, Ms. Bazelon, Mr. Dougherty, the Custodian, Mr. Harper and the Custodian's Counsel dated January 24, 2009.
 - E-mail between Mr. Wright, Mr. Dougherty, Ms. Bazelon, the Custodian and the Custodian's Counsel dated January 26, 2009.
 - E-mail between Mr. Harper, Ms. Wright, Ms. Bazelon, Mr. Dougherty and the Custodian's Counsel dated February 11, 2009.

⁵ 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.

- E-mail between Ms. Gonzalez, Ms. Wright, Mr. Moxie, Ms. Bazelon, the Custodian and Mr. Harper dated March 27, 2009.
 - E-mails between Ms. Moxie, Ms. Wright, Mr. Bazelon, Ms. Gonzalez, the Custodian, Mr. Harper and the Custodian's Counsel dated March 27, 2009.
 - E-mails between Ms. Moxie, Ms. Wright, Ms. Bazelon, the Custodian, Mr. Harper and the Custodian's Counsel dated April 7, 2009.
 - E-mails between Ms. Wright, Mr. Moxie, Ms. Bazelon, Ms. Gonzalez, the Custodian, Mr. Harper and the Custodian's Counsel dated May 14, 2009.
5. **The Custodian must deliver⁶ to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see No. 4 above), a document or redaction index⁷, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4⁸, that the records provided are the records 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.

August 26, 2010

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

August 31, 2010

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

1. one (1) copy of the requested e-mails for the *in camera* review;
2. a legal certification from the Custodian; and
3. a document index.

The Custodian certifies that he is the current custodian but was not the custodian at the time the Complainant made the OPRA request subject of this Denial of Access Complaint. The Custodian also certifies that the records requested by the Complainant are protected by the attorney-client privilege because the school's attorney was copied or the author of all communications and the communications in the chains all stemmed from e-mails initiated by the school attorney. The Custodian certifies that the e-mails provided to

⁶ 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.

⁷ The document or redaction index should identify the document and/or each redaction asserted and the lawful basis for the denial.

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."

the Council for *in camera* review are the records requested in the August 24, 2010 Interim Order.

The Custodian certifies that the following e-mails are exempt from disclosure under the attorney-client privilege:

1. January 24, 2009 e-mail from Ms. Wright regarding Rice Notice and requesting opinion and advice from the Custodian's Counsel.
2. January 26, 2009 e-mail from Ms. Wright in response to e-mails from the Custodian's Counsel and requesting an opinion from same.
3. February 11, 2009 e-mail from Mr. Harper regarding the Complainant's bonus and requesting information regarding compliance with approved policy and procedures and responded to by the Custodian's Counsel.
4. April 7, 2009 e-mail chain regarding Rice Notice in which Custodian's Counsel advice and opinions were requested.
5. March 27, 2009 e-mail chain regarding the Complainant's work performance.
6. May 14, 2009 e-mail chain in response to an e-mail sent by the Custodian's Counsel regarding non-renewal letters.

Specifically, the Custodian certifies 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 certifies that the rule further indicates that under the definition section of Evidence Rule 504:

"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.

Further, 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 expectation that its content remain confidential."

The Custodian additionally certifies 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 under the attorney-client privilege and the communications were made with the belief that they would remain confidential.

The Custodian also certifies that the seventh (7th) included e-mail dated March 27, 2009 is exempt from disclosure as advisory, consultative or deliberative material because the e-mail is pre-decisional and deliberative in nature as it contains opinions and recommendations of a Board member regarding the Complainant's employment.

The Custodian certifies that to qualify for this exemption, two conditions must be satisfied: (1) the document must have been generated before the adoption of an agency's

policy or decision, and (2) it must be deliberative in nature, containing opinions, recommendations or advice pursuant to Gannett New Jersey Partners, LP v. County of Middlesex, 379 N.J. Super. 205, 220 (App. Div. 2005).

Analysis

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

At its August 24, 2010 public meeting, the Council determined that because the Custodian asserted that the requested records were lawfully denied because they are exempt from disclosure under the attorney-client privilege and the exemption for advisory, consultative or deliberative material, the Council must determine whether the legal conclusions asserted by the Custodian are 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 Council ordered an *in camera* review of the requested records to determine the validity of the Custodian's assertion that the requested records were properly denied.

The Council therefore ordered the Custodian to deliver to the Council in a sealed envelope nine (9) copies of the requested unredacted records, a document 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 September 2, 2010.

The Custodian provided the GRC with a legal certification, only one (1) copy of the unredacted records requested for the *in camera* inspection and a document index within the time required on August 31, 2010. Therefore, the Custodian did not fully comply with the Council's August 24, 2010 Interim Order because he failed to provide the nine (9) copies of the unredacted records as ordered by the Council.

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

The Custodian asserts that he lawfully denied the Complainant access to the requested records because they are exempt from disclosure under the attorney-client privilege and the exemption for advisory, consultative or deliberative material. The Custodian certified that these e-mails were either drafted by the Freedom Academy Charter School attorney, Joseph F. Betley, Esq., to the Board members and then 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. Additionally, the Custodian certified that Mr. Betley provided his opinions and advice in the e-mails. Also, the Custodian certified that the seventh (7th) email dated March 27, 2009 is pre-decisional and deliberative in nature as it contains opinions and recommendations of a Board member regarding Mr. Ray's employment.

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.*

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

In O’Shea v. West Milford Board of Education, GRC Complaint No. 2004-93 (April 2006), the Council stated that “neither the statute nor the courts have defined the terms... ‘advisory, consultative, or deliberative’ in the context of the public records law. The Council looks to an analogous concept, the deliberative process privilege, for guidance in the implementation of OPRA’s ACD exemption. Both the ACD exemption and the deliberative process privilege enable a governmental entity to shield from disclosure material that is pre-decisional and deliberative in nature. Deliberative material contains opinions, recommendations, or advice about agency policies. In Re the Liquidation of Integrity

Insurance Company, 165 N.J. 75, 88 (2000); In re Readoption With Amendments of Death Penalty Regulations, 182 N.J.149 (App. Div. 2004).

The deliberative process privilege is a doctrine that permits government agencies to withhold documents that reflect advisory opinions, recommendations and deliberations submitted as part of a process by which governmental decisions and policies are formulated. NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 150, 95 S. Ct. 1504, 1516, 44 L. Ed. 2d 29, 47 (1975). Specifically, the New Jersey Supreme Court has ruled that a record that contains or involves factual components is entitled to deliberative-process protection under the exemption in OPRA when it was used in decision-making process *and* its disclosure would reveal deliberations that occurred during that process. Education Law Center v. NJ Department of Education, 198 N.J. 274, 966 A.2d 1054, 1069 (2009). This long-recognized privilege is rooted in the concept that the sovereign has an interest in protecting the integrity of its deliberations. The earliest federal case adopting the privilege is Kaiser Alum. & Chem. Corp. v. United States, 157 F. Supp. 939 (1958). The privilege and its rationale were subsequently adopted by the federal district courts and circuit courts of appeal. United States v. Farley, 11 F.3d 1385, 1389 (7th Cir.1993).

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

“[a] document must meet two requirements for the deliberative process privilege to apply. First, it must have been generated before the adoption of an agency's policy or decision. In other words, it must be pre-decisional. ... Second, the document must be deliberative in nature, containing opinions, recommendations, or advice about agency policies. ... Purely factual material that does not reflect deliberative processes is not protected. ... Once the government demonstrates that the subject materials meet those threshold requirements, the privilege comes into play. In such circumstances, the government's interest in candor is the "preponderating policy" and, prior to considering specific questions of application, the balance is said to have been struck in favor of non-disclosure.” (Citations omitted.) *Id.* at 84-85.

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

“[t]he initial burden falls on the state agency to show that the documents it seeks to shield are pre-decisional and deliberative in nature (containing opinions, recommendations, or advice about agency policies). Once the deliberative nature of the documents is established, there is a presumption against disclosure. The burden then falls on the party seeking discovery to show that his or her compelling or substantial need for the materials overrides

the government's interest in non-disclosure. Among the considerations are the importance of the evidence to the movant, its availability from other sources, and the effect of disclosure on frank and independent discussion of contemplated government policies.” In Re Liquidation of Integrity, *supra*, 165 N.J. at 88, *citing McClain*, *supra*, 99 N.J. at 361-62.

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

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

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

- a. That burden can be met by a showing of:
 - i. the importance of the information to the requesting party,
 - ii. its availability from other sources **and**

- iii. the effect of disclosure on frank and independent discussion of contemplated government policies.

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

Record Number	Record Name/Date	Description of Record	Custodian's Explanation/ Citation for Non-disclosure	Findings of the <i>In Camera</i> Examination⁹
1.	April 7, 2009 e-mails between Mr. Moxie, Ms. Wright, Ms. Bazelon, Mr. Davenport, Mr. Harper and Mr. Betley, Esq.	E-mail chain regarding Rice Notice in which Custodian's Counsel advice and opinions were requested.	These e-mails are exempt from disclosure under the attorney-client privilege pursuant to <u>N.J.S.A. 47:1A-1.1</u> and Evidence Rule 504.	This e-mail chain discussion is exempt under the attorney-client privilege pursuant to <u>N.J.S.A. 47:1A-1.1</u> as it involves Board members requesting legal advice on employment and Open Public Meetings Act issues from the School attorney and that attorney providing said advice.
2.	March 27, 2009 e-mails between Mr. Moxie, Ms. Wright, Ms. Bazelon, Ms.	E-mail chain regarding the Complainant's work performance.	This e-mail is exempt from disclosure under the attorney-client privilege	This e-mail discussion is exempt from disclosure as advisory, consultative or

⁹ **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.

	Gonzalez, Mr. Davenport, Mr. Harper and Mr. Betley, Esq.		pursuant to <u>N.J.S.A.</u> 47:1A-1.1. and Evidence Rule 504.	deliberative material pursuant to <u>N.J.S.A.</u> 47:1A-1.1. because Board members are contemplating an employment issue. This discussion is part of the deliberative process.
3.	February 11, 2009 e-mail between Mr. Harper, Ms. Wright, Ms. Bazelon, Mr. Dougherty and Mr. Betley, Esq.	E-mail from Mr. Harper regarding the Complainant's bonus and requesting information regarding compliance with approved policy and procedures. Responded to by the Custodian's Counsel.	These e-mails are exempt from disclosure under the attorney-client privilege pursuant to <u>N.J.S.A.</u> 47:1A-1.1. and Evidence Rule 504.	This e-mail discussion is exempt under the attorney-client privilege pursuant to <u>N.J.S.A.</u> 47:1A-1.1. as it involves Board members requesting legal advice on employment and administrative issues from the School attorney and that attorney providing said advice. Additionally, this e-mail discussion is exempt from disclosure as advisory, consultative or deliberative material pursuant to <u>N.J.S.A.</u> 47:1A-1.1. because Board members are contemplating an employment issue. This discussion is part of the deliberative process.
4.	January 26, 2009 e-mail between Ms.	E-mail from Ms. Wright in response to e-	This e-mail is exempt from disclosure	This e-mail discussion is exempt under the

	Wright, Mr. Dougherty, Ms. Bazelon, Mr. Harper and Mr. Betley, Esq.	mails from the Custodian's Counsel and requesting an opinion from same.	under the attorney-client privilege pursuant to <u>N.J.S.A. 47:1A-1.1.</u> and Evidence Rule 504.	attorney-client privilege pursuant to <u>N.J.S.A. 47:1A-1.1.</u> as it involves Board members requesting legal advice on employment and administrative issues from the School attorney and that attorney providing said advice.
5.	January 24, 2009 e-mail between Ms. Wright, Ms. Bazelon, Mr. Dougherty, Mr. Davenport, Mr. Harper and Mr. Betley, Esq.	E-mail from Ms. Wright regarding Rice Notice and requesting opinion and advice from the Custodian's Counsel.	These e-mails are exempt from disclosure under the attorney-client privilege pursuant to <u>N.J.S.A. 47:1A-1.1.</u> and Evidence Rule 504.	This e-mail discussion is exempt from disclosure as advisory, consultative or deliberative material pursuant to <u>N.J.S.A. 47:1A-1.1.</u> because Board members are contemplating an employment issue. This discussion is part of the deliberative process. Additionally, a Board member is requesting legal advice from the School Board attorney making this discussion exempt from disclosure as attorney-client privilege pursuant to <u>N.J.S.A. 47:1.1.</u>
6.	May 14, 2009 e-mails between Ms. Wright, Mr. Moxie, Ms.	E-mail chain in response to an e-mail sent by the Custodian's Counsel	These e-mails are exempt from disclosure under the attorney-client	This e-mail discussion is exempt under the attorney-client privilege pursuant

	Bazon, Ms. Gonzalez, Mr. Davenport, Mr. Harper and Mr. Betley, Esq.	regarding non-renewal letters.	privilege pursuant to <u>N.J.S.A. 47:1A-1.1.</u> and Evidence Rule 504.	to <u>N.J.S.A. 47:1A-1.1.</u> as it involves Board members receiving legal advice on employment and administrative issues from the School attorney.
7.	March 27, 2009 e-mail between Ms. Gonzalez, Ms. Wright, Mr. Moxie, Ms. Bazon, Mr. Davenport and Mr. Harper.	This e-mail chain is a duplicate of #2 above as indicated in the Custodian's certification.	This e-mail chain is a duplicate of #2 above as indicated in the Custodian's certification.	This e-mail chain is a duplicate of #2 above as indicated in the Custodian's certification.

Thus, the Custodian lawfully denied access to the e-mail discussions because said discussions are exempt from disclosure as attorney-client privilege and/or as advisory, consultative or deliberative material pursuant to N.J.S.A. 47:1A-1.1. Specifically, the e-mail discussions involve the School Board members requesting and/or receiving legal advice from the School attorney or the members' deliberations over how to handle personnel or administrative matters. Therefore, the e-mail discussions are exempt from disclosure under OPRA.

However, consistent with N.J.S.A. 47:1A-5.g., if the custodian of a government record asserts that part of a particular record is exempt from public access pursuant to OPRA, the custodian must delete or excise from a copy of the record that portion which the custodian asserts is exempt from access and must promptly permit access to the remainder of the record. Thus, the Custodian must disclose all other portions of the requested e-mails to the Complainant (i.e. sender, recipients, date, time, subject, and closing salutations). To these portions of the requested e-mails, the Custodian has unlawfully denied access.

The GRC need not address the Custodian's assertion that the requested e-mails are also exempt under the Rules of Evidence since the *in camera* review determined that the records are exempt under the attorney-client privilege and as advisory, consultative or deliberative material 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 has not complied with the Council's August 24, 2010 Interim Order by providing the Council with all records set forth in Paragraph 5 of the Order within five (5) business days of receiving the Council's Order. The Custodian provided the GRC with a legal certification, only one (1) copy of the unredacted records requested for the *in camera* inspection and a document index within the time required on August 31, 2010. Therefore, the Custodian did not fully comply with the Council's August 24, 2010 Interim Order because he failed to provide the nine (9) copies of the unredacted records as ordered by the Council.
2. The Custodian lawfully denied access to the e-mail discussions because said discussions are exempt from disclosure as attorney-client privilege and/or as advisory, consultative or deliberative material pursuant to N.J.S.A. 47:1A-1.1. Specifically, the e-mail discussions involve the School Board members requesting and/or receiving legal advice from the School attorney or the members' deliberations over how to handle personnel or administrative matters. Therefore, the e-mail discussions are exempt from disclosure under OPRA.
3. **On the basis of the Council's determination in this matter in the above table, the Custodian must disclose all other portions of the requested e-mails to the Complainant (i.e. sender, recipients, date, time, subject, and closing salutations).**
4. **The Custodian must comply with this order 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.**
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.

Approved By: Catherine Starghill, Esq.
Executive Director

May 17, 2011



State of New Jersey
GOVERNMENT RECORDS COUNCIL
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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

Jnanendra P. Ray
Complainant

Complaint No. 2009-185

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 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 regarding the following topics: “... during the 2008-2009 school year which led to the non-renewal of the Complainant’s contract ... [b]oard resolutions and approved meeting minutes regarding the Complainant’s placement on Administrative Leave effective December 17, 2008 ... [t]he Complainant’s reinstatement letter ... [t]he Rice notice served to the Complainant on January 27, 2009 [and] [t]he Rice notice served to the Complainant on April 6, 2009,” 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).¹

¹ 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.



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 following e-mails to determine the validity of the Custodian's assertion that the record contains information which is exempt from disclosure as attorney-client privileged and advisory, consultative or deliberative pursuant to N.J.S.A. 47:1A-1.1:
 - E-mail between Ms. Wright, Ms. Bazelon, Mr. Dougherty, the Custodian, Mr. Harper and the Custodian's Counsel dated January 24, 2009.
 - E-mail between Mr. Wright, Mr. Dougherty, Ms. Bazelon, the Custodian and the Custodian's Counsel dated January 26, 2009.
 - E-mail between Mr. Harper, Ms. Wright, Ms. Bazelon, Mr. Dougherty and the Custodian's Counsel dated February 11, 2009.
 - E-mail between Ms. Gonzalez, Ms. Wright, Mr. Moxie, Ms. Bazelon, the Custodian and Mr. Harper dated March 27, 2009.
 - E-mails between Ms. Moxie, Ms. Wright, Mr. Bazelon, Ms. Gonzalez, the Custodian, Mr. Harper and the Custodian's Counsel dated March 27, 2009.
 - E-mails between Ms. Moxie, Ms. Wright, Ms. Bazelon, the Custodian, Mr. Harper and the Custodian's Counsel dated April 7, 2009.
 - E-mails between Ms. Wright, Mr. Moxie, Ms. Bazelon, Ms. Gonzalez, the Custodian, Mr. Harper and the Custodian's Counsel dated May 14, 2009.
5. **The Custodian must deliver² to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see No. 4 above), a document or redaction index³, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4⁴, that the records provided are the records 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 24th Day of August, 2010

² 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.

³ The document or redaction index should identify the document and/or each redaction asserted and the lawful basis for the denial.

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."

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

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

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

**Jnanendra P. Ray¹
Complainant**

GRC Complaint No. 2009-185

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 Freedom Academy Charter School Board (“Board”) and Mr. E. Harper, School Leader, regarding the following topics:

- 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.
- Board resolutions and approved meeting minutes regarding the Complainant’s placement on Administrative Leave effective December 17, 2008.
- The Complainant’s re-instatement letter.
- The Rice notice served to the Complainant on January 27, 2009.
- The Rice notice served to the Complainant on April 6, 2009.

Request Made: May 21, 2009

Response Made: June 4, 2009

Custodian: Steven Gilmartin³

GRC Complaint Filed: June 3, 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 request referencing OPRA.

June 3, 2009

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

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.

The Complainant states that he submitted a letter request to the School on May 21, 2009. The Complainant states that he did not receive a response to his request.

The Complainant does not agree to mediate this complaint.

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. The Custodian states that access to personnel committee meeting and executive 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 material.

Further, the Custodian states that no Board minutes or resolutions relating to the Complainant being placed on administrative leave (see request Item No. 2) exist.

Lastly, the Custodian states that 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.

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.

September 15, 2009

E-mail from the GRC to the Custodian's Counsel. The GRC grants an extension 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.

The Custodian certifies that no 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”).⁵

The Custodian certifies that he received the Complainant’s letter request on May 21, 2009. The Custodian certifies that he responded to the Complainant’s request on June 4, 2009 denying access to the requested records. The Custodian identifies eleven (11) records responsive to the Complainant’s letter request:

Record Responsive	General Nature Description of Record	Legal Basis for Denial of Access
Executive session meeting minutes dated January 29, 2009	Minutes of meeting in which the Custodian’s Counsel attended and gave extensive advice and opinions.	Attorney-client privileged record.
E-mails between Ms. Moxie, Ms. Wright, Ms. Bazelon, the Custodian, Mr. Harper and the Custodian’s Counsel, dated April 7, 2009	E-mail chain regarding Rice Notice in which Custodian’s Counsel advice and opinions were requested.	Attorney-client privileged record.
E-mails between Ms. Moxie, Ms. Wright, Mr. Bazelon, Ms. Gonzalez, the Custodian, Mr. Harper and the Custodian’s Counsel, dated March 27, 2009	E-mail chain regarding the Complainant’s work performance.	Attorney-client privileged record.
E-mail between Mr. Harper, Ms. Wright, Ms. Bazelon, Mr. Dougherty and the Custodian’s Counsel, dated February 11, 2009	E-mail from Mr. Harper regarding the Complainant’s bonus and requesting information regarding compliance with approved policy and procedures. Responded to by the Custodian’s Counsel.	Attorney-client privileged record.
E-mail between Mr. Wright, Mr. Dougherty, Ms. Bazelon, the Custodian and the Custodian’s Counsel, dated January 26, 2009	E-mail from Ms. Wright in response to e-mails from the Custodian’s Counsel and requesting an opinion from same.	Attorney-client privileged record.
E-mail between Ms. Wright, Ms. Bazelon, Mr. Dougherty, the Custodian, Mr. Harper and the Custodian’s Counsel, dated	E-mail from Ms. Wright regarding Rice Notice and requesting opinion and advice from the Custodian’s Counsel.	Attorney-client privileged record.

⁵ The Custodian further certified that all documents were located, but did not include what type of search he undertook to locate said records.
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January 24, 2009		
E-mails between Ms. Wright, Mr. Moxie, Ms. Bazelon, Ms. Gonzalez, the Custodian, Mr. Harper and the Custodian's Counsel, dated May 14, 2009	E-mail chain in response to an e-mail sent by the Custodian's Counsel regarding non-renewal letters.	Attorney-client privileged record.
Personnel committee meeting minutes dated April 28, 2009	Minutes of meeting in which the Custodian's Counsel attended and gave extensive advice and opinions.	Attorney-client privileged record.
Personnel committee meeting minutes dated March 24, 2009	Minutes of meeting in which the Custodian's Counsel attended and gave extensive advice and opinions.	Attorney-client privileged record.
Personnel committee meeting minutes dated March 18, 2009	Minutes of meeting in which the Custodian's Counsel attended and gave extensive advice and opinions.	Attorney-client privileged record.
E-mail between Ms. Gonzalez, Ms. Wright, Mr. Moxie, Ms. Bazelon, the Custodian and Mr. Harper dated March 27, 2009	E-mail memorializing personal opinion of Board members and deliberative process.	Deliberative process exception

The Custodian's Counsel submits a legal brief in support of the School's position. Counsel asserts that the School stands by its determination that the requested records are exempt from disclosure as attorney-client privileged and ACD material.

Counsel contends that access to the eleven (11) records responsive to the Complainant's letter request was denied because said records are protected under the attorney-client privilege. Counsel avers that he provided opinions and advice at the personnel committee meetings and executive session meetings, thereby invoking the attorney-client privilege. Counsel further avers that he was also the recipient of communications between the Board and Mr. Harper, for which Counsel's advice, opinions and analysis of law were requested.

Counsel states that OPRA provides that, "[a] government record shall not include the following information which is deemed to be confidential ... any record within the attorney-client privilege." N.J.S.A. 47:1A-1.1.

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)*.

Further, Counsel states that Rules of Evidence 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 committee and executive session meetings 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 myriad issues relating to the Complainant. Counsel further argues that such requests 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 letter request.

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.

Counsel avers that N.J.S.A. 47:1A-1.1 exempts from disclosure under OPRA any record that contains advisory, consultative or deliberative (“ACD”) material; this exemption is also referred to as the deliberative process exception. Counsel states that to qualify for this privilege, two (2) conditions must be met: (1) the document must have been generated before the adoption of an agency’s policy or decision, and; (2) it must be deliberative in nature, containing opinions, recommendations or advice. *See Gannett New Jersey Partners, LP v. County of Middlesex*, 379 N.J. Super. 205, 220 (App. Div. 2005). Counsel argues that the e-mail chain dated March 27, 2009 is pre-decisional and deliberative in nature as it contains opinions and recommendations of a Board member regarding the Complainant’s employment.

Finally, Counsel reiterates that the records responsive are exempt from disclosure because some are protected by the attorney-client privilege and the deliberative process exemption. N.J.S.A. 47:1A-1.1.

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 ... 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.⁶ 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) days 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., 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, which cited to OPRA, 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, regarding the following topics: ...during the 2008-2009 school year which led to the non-renewal of the Complainant’s contract... [b]oard resolutions and approved meeting minutes regarding the Complainant’s placement on Administrative Leave effective December 17, 2008 ... [t]he Complainant’s re-instatement letter ... [t]he Rice notice served to the Complainant on January 27, 2009 [and] [t]he Rice notice served to the Complainant on April 6, 2009.”

⁶ 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.

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 regarding the following topics: ...during the 2008-2009 school year which led to the non-renewal of the Complainant’s contract... [b]oard resolutions and approved meeting minutes regarding the Complainant’s placement on Administrative Leave effective December 17, 2008 ... [t]he Complainant’s reinstatement letter ... [t]he Rice notice served to the Complainant on January 27, 2009 [and] [t]he Rice notice served to the Complainant on April 6, 2009,” 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 in the SOI that four (4) records responsive existed. 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 regarding the following topics: ... during the 2008-2009 school year which led to the non-renewal of the Complainant’s contract... [b]oard resolutions and approved meeting minutes regarding the Complainant’s placement on Administrative Leave effective December 17, 2008 ... [t]he Complainant’s re-instatement letter ... [t]he Rice notice served to the Complainant on January 27, 2009 [and] [t]he Rice notice served to the Complainant on April 6, 2009,” 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 regarding the following topics: ... during the 2008-2009 school year which led to the non-renewal of the Complainant’s contract... [b]oard resolutions and approved meeting minutes regarding the Complainant’s placement on Administrative Leave effective December 17, 2008 ... [t]he Complainant’s re-instatement letter ... [t]he Rice notice served to the Complainant on January 27, 2009 [and] [t]he Rice notice served to the Complainant on April 6, 2009,” 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).⁷

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 ... [b]oard resolutions and approved meeting minutes regarding the Complainant’s placement on Administrative Leave effective December 17, 2008 ... [t]he Complainant’s re-instatement letter ... [t]he Rice notice served to the Complainant

⁷ 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.

on January 27, 2009 [and] [t]he Rice notice served to the Complainant on April 6, 2009,” 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 seven (7) e-mail chains responsive to the Complainant’s request.

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 seven (7) e-mail chains 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 GRC⁸ 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.”

⁸ Paff v. NJ Department of Labor, Board of Review, GRC Complaint No. 2003-128 (October 2005).
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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 to determine the validity of the Custodian’s assertion that the record contains information which is exempt from disclosure as attorney-client privileged and ACD pursuant to N.J.S.A. 47:1A-1.1:

- E-mail between Ms. Wright, Ms. Bazelon, Mr. Dougherty, the Custodian, Mr. Harper and the Custodian’s Counsel dated January 24, 2009.
- E-mail between Mr. Wright, Mr. Dougherty, Ms. Bazelon, the Custodian and the Custodian’s Counsel dated January 26, 2009.
- E-mail between Mr. Harper, Ms. Wright, Ms. Bazelon, Mr. Dougherty and the Custodian’s Counsel dated February 11, 2009.
- E-mail between Ms. Gonzalez, Ms. Wright, Mr. Moxie, Ms. Bazelon, the Custodian and Mr. Harper dated March 27, 2009.
- E-mails between Ms. Moxie, Ms. Wright, Mr. Bazelon, Ms. Gonzalez, the Custodian, Mr. Harper and the Custodian’s Counsel dated March 27, 2009.
- E-mails between Ms. Moxie, Ms. Wright, Ms. Bazelon, the Custodian, Mr. Harper and the Custodian’s Counsel dated April 7, 2009.
- E-mails between Ms. Wright, Mr. Moxie, Ms. Bazelon, Ms. Gonzalez, the Custodian, Mr. Harper and the Custodian’s Counsel dated May 14, 2009.

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 regarding the following topics: "... during the 2008-2009 school year which led to the non-renewal of the Complainant's contract ... [b]oard resolutions and approved meeting minutes regarding the Complainant's placement on Administrative Leave effective December 17, 2008 ... [t]he Complainant's re-instatement letter ... [t]he Rice notice served to the Complainant on January 27, 2009 [and] [t]he Rice notice served to the Complainant on April 6, 2009," 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).⁹
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 following e-mails to determine the validity of the Custodian's assertion that the record contains information which is exempt from disclosure as attorney-client privileged and advisory, consultative or deliberative pursuant to N.J.S.A. 47:1A-1.1:
 - E-mail between Ms. Wright, Ms. Bazelon, Mr. Dougherty, the Custodian, Mr. Harper and the Custodian's Counsel dated January 24, 2009.
 - E-mail between Mr. Wright, Mr. Dougherty, Ms. Bazelon, the Custodian and the Custodian's Counsel dated January 26, 2009.
 - E-mail between Mr. Harper, Ms. Wright, Ms. Bazelon, Mr. Dougherty and the Custodian's Counsel dated February 11, 2009.
 - E-mail between Ms. Gonzalez, Ms. Wright, Mr. Moxie, Ms. Bazelon, the Custodian and Mr. Harper dated March 27, 2009.
 - E-mails between Ms. Moxie, Ms. Wright, Mr. Bazelon, Ms. Gonzalez, the Custodian, Mr. Harper and the Custodian's Counsel dated March 27, 2009.

⁹ 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.

- E-mails between Ms. Moxie, Ms. Wright, Ms. Bazelon, the Custodian, Mr. Harper and the Custodian's Counsel dated April 7, 2009.
 - E-mails between Ms. Wright, Mr. Moxie, Ms. Bazelon, Ms. Gonzalez, the Custodian, Mr. Harper and the Custodian's Counsel dated May 14, 2009.
5. **The Custodian must deliver¹⁰ to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see No. 4 above), a document or redaction index¹¹, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4¹², that the records provided are the records 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
Senior Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

August 17, 2010

¹⁰ 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.

¹¹ The document or redaction index should identify the document and/or each redaction asserted and the lawful basis for the denial.

¹² "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."