



State of New Jersey  
GOVERNMENT RECORDS COUNCIL

101 SOUTH BROAD STREET  
PO BOX 819  
TRENTON, NJ 08625-0819

CHRIS CHRISTIE  
Governor

KIM GUADAGNO  
Lt. Governor

RICHARD E. CONSTABLE, III  
Acting Commissioner

**FINAL DECISION**

**March 27, 2012 Government Records Council Meeting**

Jesse Wolosky  
Complainant

Complaint No. 2009-94

v.

Andover Regional School District (Sussex)  
Custodian of Record

At the March 27, 2012 public meeting, the Government Records Council (“Council”) considered the March 20, 2012 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, dismisses this complaint because the Complainant withdrew his complaint via e-mail to the GRC dated March 5, 2012 (via legal counsel) because the parties have settled this matter. Therefore, no further adjudication is required.

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

Final Decision Rendered by the  
Government Records Council  
On The 27<sup>th</sup> Day of March, 2012

Robin Berg Tabakin, Chair  
Government Records Council

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

Catherine Starghill, Executive Director  
Government Records Council

**Decision Distribution Date: April 3, 2012**



**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director  
March 27, 2012 Council Meeting**

**Jesse Wolosky<sup>1</sup>  
Complainant**

**GRC Complaint No. 2009-94**

v.

**Andover Regional School District  
(Sussex)<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:** Approved executive session minutes for September, October, November and December 2008.<sup>3</sup>

**Request Made:** February 4, 2009

**Response Made:** February 4, 2009

**Custodian:** Terry Van Auken

**GRC Complaint Filed:** March 16, 2009<sup>4</sup>

**Background**

**October 26, 2010**

Government Records Council's ("Council") Interim Order. At its October 26, 2010 public meeting, the Council considered the October 19, 2010 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. The Custodian timely complied with the Council's August 24, 2010 Interim Order by providing access to the requested records containing the redactions specified in the Council's Order to the Complainant and provided certified confirmation to the GRC within the extended time frame to comply.
2. Although the Custodian violated N.J.S.A. 47:1A-5.g. by providing an insufficient response to the Complainant's request and failed to bear her burden of proving a lawful denial of access to the requested executive session ... minutes (which were officially approved by the Board at the time of the Complainant's OPRA request) pursuant to N.J.S.A. 47:1A-6, the Custodian timely complied with the Council's April 28, 2010 Interim Order and

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<sup>1</sup> Represented by Walter M. Luers, Esq., of Law Offices of Walter M. Luers, LLC (Clinton, NJ).

<sup>2</sup> Represented by Allan Dzwilewski, Esq., of Schwartz, Simon, Edelstein, Celso & Kessler (Morristown, NJ).

<sup>3</sup> The Complainant requested additional records that are not at issue in the instant complaint.

<sup>4</sup> The GRC received the Denial of Access Complaint on said date.

disclosed the requested executive session minutes with redactions determined to be appropriate by the Council pursuant to the Council's August 24, 2010 Interim Order. Therefore, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

3. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), and the Council's April 28, 2010 and August 24, 2010 Interim Orders, the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." *Id.* at 432. Additionally, pursuant to Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6, [Teeters], and [Mason]. Thus, this complaint should be referred to the Office of Administrative Law for the determination of reasonable prevailing party attorney's fees.

#### **October 28, 2010**

Council's Interim Order distributed to the parties.

#### **August 5, 2011**

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

#### **March 5, 2012**

E-mail from the Complainant's Counsel to the GRC, attaching a letter from Counsel to the Honorable Sandra A. Robinson, Administrative Law Judge ("ALJ"), dated March 5, 2012. Counsel states that the Complainant withdraws this complaint because the parties have settled this matter.

#### **Analysis**

No analysis required.

#### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council dismiss this complaint because the Complainant withdrew his complaint via e-mail to the GRC dated March 5, 2012 (via legal counsel) because the parties have settled this matter. Therefore, no further adjudication is required.

Prepared By: Frank F. Caruso  
Senior Case Manager

Approved By: Catherine Starghill, Esq.  
Executive Director  
March 20, 2012



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

CHRIS CHRISTIE  
Governor

KIM GUADAGNO  
Lt. Governor

LORI GRIFA  
Commissioner

**INTERIM ORDER**

**October 26, 2010 Government Records Council Meeting**

Jesse Wolosky  
Complainant

Complaint No. 2009-94

v.

Andover Regional School District (Sussex)  
Custodian of Record

At the October 26, 2010 public meeting, the Government Records Council (“Council”) considered the October 19, 2010 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian timely complied with the Council’s August 24, 2010 Interim Order by providing access to the requested records containing the redactions specified in the Council’s Order to the Complainant and provided certified confirmation to the GRC within the extending time frame to comply.
2. Although the Custodian violated N.J.S.A. 47:1A-5.g. by providing an insufficient response to the Complainant’s request and failed to bear her burden of proving a lawful denied access to the requested executive session meeting minutes (which were officially approved by the Board at the time of the Complainant’s OPRA request) pursuant to N.J.S.A. 47:1A-6, the Custodian timely complied with the Council’s April 28, 2010 Interim Order and disclosed the requested executive session minutes with redactions determined to be appropriate by the Council pursuant to the Council’s August 24, 2010 Interim Order. Therefore, it is concluded that the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.
3. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), and the Council’s April 28, 2010 and August 24, 2010 Interim Orders, the Complainant has achieved “the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian’s conduct.” *Id.* at 432. Additionally, pursuant to Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), a factual causal nexus exists between the Complainant’s filing of a Denial of Access Complaint and the relief ultimately achieved. Further, the relief ultimately



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

Interim Order Rendered by the  
Government Records Council  
On The 26<sup>th</sup> Day of October, 2010

Robin Berg Tabakin, Chair  
Government Records Council

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

Charles A. Richman, Secretary  
Government Records Council

**Decision Distribution Date: October 28, 2010**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

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

**Jesse Wolosky<sup>1</sup>  
Complainant**

**GRC Complaint No. 2009-94**

v.

**Andover Regional School District  
(Sussex)<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:** Approved executive session meeting minutes for September, October, November and December 2008.<sup>3</sup>

**Request Made:** February 4, 2009

**Response Made:** February 4, 2009

**Custodian:** Terry Van Auken

**GRC Complaint Filed:** March 16, 2009<sup>4</sup>

**Background**

**August 24, 2010**

Government Records Council's ("Council") Interim Order. At its August 24, 2010 public meeting, the Council considered the August 21, 2010 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. The Custodian has complied with the Council's April 28, 2010 Interim Order by providing the Council with all records set forth in Paragraph 3 of the Order within five (5) business days of receiving the Council's Order.
2. **On the basis of the Council's determination in this matter, the Custodian shall comply with the Council's Findings of the *In Camera* Examination set forth in the above table within five (5) business days from receipt of this Order and simultaneously provide certified confirmation of compliance pursuant to N.J. Court Rule, 1969 R. 1:4-4 (2005) to the Executive Director.**

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

<sup>2</sup> Represented by Allan Dzwilewski, Esq., of Schwartz, Simon, Edelstein, Celso & Kessler (Morristown, NJ).

<sup>3</sup> The Complainant requested additional records that are not at issue in the instant complaint.

<sup>4</sup> The GRC received the Denial of Access Complaint on said date.

Specifically, the Custodian must disclose records as follows:

- (1) **Executive Session from September 16, 2008 – Sewer Plan/Wastewater Treatment Plan. The Custodian must disclose the first (1<sup>st</sup>) sentence under this section heading.**
  - (2) **Executive Session from September 16, 2008 – Student Issue. The Custodian must disclose the last two (2) sentences under this section heading.**
  - (3) **Executive Session from October 7, 2008 – Negotiations. The Custodian must disclose the first (1<sup>st</sup>) sentence under this section heading.**
  - (4) **Executive Session from October 7, 2008 – Long-Term Substitute. The Custodian must disclose this entire discussion.**
  - (5) **Executive Session from October 7, 2008 – Student Issue. The Custodian must disclose this entire discussion except for the student identification number (for privacy concerns) and the date, both included in the first (1<sup>st</sup>) sentence of this discussion.**
  - (6) **Executive Session from November 4, 2008 – Student Matter. The Custodian must disclose this entire discussion except for the student identification number (for privacy concerns) included in the first (1<sup>st</sup>) sentence of this discussion.**
  - (7) **Executive Session from November 18, 2008 – Paraprofessionals Negotiations. The Custodian must disclose the first (1<sup>st</sup>) sentence under this section heading.**
  - (8) **Executive Session from December 2, 2008 – Sewer Plant. The Custodian must disclose the first (1<sup>st</sup>) sentence under this section heading.**
  - (9) **Executive Session from December 2, 2008 – Negotiations. The Custodian must disclose the first (1<sup>st</sup>) sentence under this section heading.**
  - (10) **Executive Session from December 16, 2008 – Negotiations. The Custodian must disclose the first (1<sup>st</sup>) sentence up to the word “on” under this section heading.**
3. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian’s compliance with the Council’s Interim Order.
  4. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian’s compliance with the Council’s Interim Order.



**August 26, 2010**

Council's Interim Order distributed to the parties.

**August 27, 2010**

E-mail from the Custodian's Counsel to the GRC. The Custodian's Counsel requests an extension of one (1) day, or until September 3, 2010, to comply with the Council's Interim Order.

**August 27, 2010**

E-mail from the GRC to the Custodian's Counsel. The GRC grants an extension of one (1) day, or until September 3, 2010, to comply with the Council's Interim Order.

**September 2, 2010**

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

- OPRA certification,
- Executive session meeting minutes responsive containing the redactions specified by the Council's Interim Order.

The Custodian certifies that she copied the Complainant and Counsel on this response and will be sending same via facsimile and U.S. mail.

Additionally, the Custodian notes that she believes that the Council's Interim Order erroneously indicated that the October 7, 2008 meeting minutes contained the heading *Student Issue*, when in fact this heading appears in the October 21, 2008 meeting minutes. The Custodian states that this error is pointed out in order to avoid any potential issues.

**Analysis**

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

At its August 24, 2010 public meeting, the Council ordered that "the Custodian shall comply with the Council's Findings of the *In Camera* Examination set forth in the below table within five (5) business days from receipt of this Order and simultaneously provide certified confirmation of compliance pursuant to N.J. Court Rule, 1969 R. 1:4-4 (2005) to the Executive Director:"

- (1) Executive Session from September 16, 2008 – Sewer Plan/Wastewater Treatment Plan. The Custodian must disclose the first (1<sup>st</sup>) sentence under this section heading.
- (2) Executive Session from September 16, 2008 – Student Issue. The Custodian must disclose the last two (2) sentences under this section heading.

- (3) Executive Session from October 7, 2008 – Negotiations. The Custodian must disclose the first (1<sup>st</sup>) sentence under this section heading.
- (4) Executive Session from October 7, 2008 – Long-Term Substitute. The Custodian must disclose this entire discussion.
- (5) Executive Session from October 21, 2008 – Student Issue. The Custodian must disclose this entire discussion except for the student identification number (for privacy concerns) and the date, both included in the first (1<sup>st</sup>) sentence of this discussion.<sup>5</sup>
- (6) Executive Session from November 4, 2008 – Student Matter. The Custodian must disclose this entire discussion except for the student identification number (for privacy concerns) included in the first (1<sup>st</sup>) sentence of this discussion.
- (7) Executive Session from November 18, 2008 – Paraprofessionals Negotiations. The Custodian must disclose the first (1<sup>st</sup>) sentence under this section heading.
- (8) Executive Session from December 2, 2008 – Sewer Plant. The Custodian must disclose the first (1<sup>st</sup>) sentence under this section heading.
- (9) Executive Session from December 2, 2008 – Negotiations. The Custodian must disclose the first (1<sup>st</sup>) sentence under this section heading.
- (10) Executive Session from December 16, 2008 – Negotiations. The Custodian must disclose the first (1<sup>st</sup>) sentence up to the word “on” under this section heading.

The Council ordered the Custodian to comply with the Interim Order within five (5) business days from receipt of the Order and simultaneously provide certified confirmation of compliance pursuant to N.J. Court Rules, 1969 R. 1:4-4 (2005)<sup>6</sup> to the Executive Director. Such compliance 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’s Counsel e-mailed the GRC on August 27, 2010 requesting an extension of one (1) business day, or until September 3, 2010, to comply with the Council’s Order. The GRC responded on the same day granting the requested extension.

The Custodian provided the Complainant and the GRC with a legal certification and copies of the requested records containing the redactions specified in the Council’s Interim Order on September 2, 2010. Therefore, the Custodian timely complied with the Council’s August 24, 2010 Interim Order by providing access to the requested records with the redactions specified in the Council’s Order to the Complainant and provided certified confirmation to the GRC within the extended time frame to comply.

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<sup>5</sup> This conclusion has been changed to reflect that the Custodian has correctly noted that the redaction in question is contained within the meeting minutes dated October 21, 2008 and not the meeting minutes dated October 7, 2008.

<sup>6</sup> “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.”

**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).

In this complaint, the GRC determined that the Custodian's initial response was insufficient because the Custodian failed to specifically state whether the requested executive session meeting minutes were approved by the governing body at the time of the Complainant's request pursuant to N.J.S.A. 47:1A-5.g. and Paff v. Township of Berkeley Heights (Union), GRC Complaint No. 2007-271 (November 2008). Additionally, the GRC determined that the Custodian had unlawfully denied access to the requested minutes because said minutes were approved prior to the Complainant's OPRA request. *See* Parave-Fogg v. Lower Alloways Creek Township, GRC Complaint No. 2006-51 (August 2006).

The Custodian subsequently disclosed the requested minutes to the Complainant with an apparent electronic redaction that the Complainant disputed did not represent the original composition of the minutes. Upon certification by the Custodian that the minutes contained the sentence “[t]his matter remains confidential due to [ACD] materials not subject to public disclosure,” the Complainant provided meeting minutes containing

entries and not the identified sentence. The Custodian later responded to the Complainant's allegations that the Custodian had falsified a legal certification by stating that she had accidentally provided copies of work product and that she still stood by her original certification. The GRC determined that the Custodian had more than likely chosen to electronically redact the records; however, the method chosen did not make the redactions visually obvious.

The GRC in turn requested that the meeting minutes be produced for an *in camera* review. The Custodian timely complied with the Council's April 28, 2010 Interim Order on May 5, 2010. After the conclusion of the *in camera* review, the GRC ordered disclosure of the requested meeting minutes with the redactions specified by the Council's August 24, 2010 Interim Order. The Custodian also timely complied with this Interim Order.

Therefore, although the Custodian violated N.J.S.A. 47:1A-5.g. by providing an insufficient response to the Complainant's request and failed to bear her burden of proving a lawful denied access to the requested executive session meeting minutes (which were officially approved by the Board at the time of the Complainant's OPRA request) pursuant to N.J.S.A. 47:1A-6, the Custodian timely complied with the Council's April 28, 2010 Interim Order and disclosed the requested executive session minutes with redactions determined to be appropriate by the Council pursuant to the Council's August 24, 2010 Interim Order. Therefore, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

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

OPRA provides that:

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

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

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

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

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

Additionally, the New Jersey Supreme Court has ruled on the issue of “prevailing party” attorney’s fees. In Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), the court discussed the catalyst theory, “which posits that a plaintiff is a ‘prevailing party’ if it achieves the desired result because the lawsuit brought about a voluntary change in the defendant’s conduct.” Mason, *supra*, at 71, (quoting Buckhannon Board & Care Home v. West Virginia Department of Health & Human Resources, 532 U.S. 598, 131 S. Ct. 1835, 149 L. Ed. 2d 855 (2001)). In Buckhannon, the Supreme Court stated that the phrase “prevailing party” is a legal term of art that refers to a “party in whose favor a judgment is rendered.” (quoting Black’s Law Dictionary 1145 (7<sup>th</sup> ed. 1999)). The Supreme Court rejected the catalyst theory as a basis for prevailing party attorney fees, in part because “[i]t allows an award where there is no judicially sanctioned change in the legal relationship of the parties.” *Id.* at 605, 121 S. Ct. at 1840, 149 L. Ed. 2d at 863, but also over concern that the catalyst theory would spawn extra litigation over attorney's fees. *Id.* at 609, 121 S. Ct. at 1843, 149 L. Ed. 2d at 866.

As the New Jersey Supreme Court noted in Mason, Buckhannon is binding only when counsel fee provisions under federal statutes are at issue. 196 N.J. at 72, *citing Teeters*, *supra*, 387 N.J. Super. at 429; *see, e.g.*, Baer v. Klagholz, 346 N.J. Super. 79 (App. Div. 2001) (applying Buckhannon to the federal Individuals with Disabilities Education Act), *certif. denied*, 174 N.J. 193 (2002). “But in interpreting New Jersey law, we look to state law precedent and the specific state statute before us. When appropriate, we depart from the reasoning of federal cases that interpret comparable federal statutes.” 196 N.J. at 73 (citations omitted).

The Mason Court then examined the catalyst theory within the context of New Jersey law, stating that:

“New Jersey law has long recognized the catalyst theory. In 1984, this Court considered the term “prevailing party” within the meaning of the federal Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C.A. § 1988. Singer v. State, 95 N.J. 487, 495, *cert. denied*, New Jersey v. Singer,

469 U.S. 832, 105 S. Ct. 121, 83 L. Ed. 2d 64 (1984). The Court adopted a two-part test espousing the catalyst theory, consistent with federal law at the time: (1) there must be "a factual causal nexus between plaintiff's litigation and the relief ultimately achieved;" in other words, plaintiff's efforts must be a "necessary and important factor in obtaining the relief," *Id.* at 494-95, 472 A.2d 138 (internal quotations and citations omitted); and (2) "it must be shown that the relief ultimately secured by plaintiffs had a basis in law," *Id.* at 495. *See also* North Bergen Rex Transport v. TLC, 158 N.J. 561, 570-71 (1999)(applying Singer fee-shifting test to commercial contract).

Also prior to Buckhannon, the Appellate Division applied the catalyst doctrine in the context of the Law Against Discrimination, N.J.S.A. 10:5-1 to -49, and the Americans with Disabilities Act, 42 U.S.C.A. §§ 12101-12213. Warrington v. Vill. Supermarket, Inc., 328 N.J. Super. 410 (App. Div. 2000). The Appellate Division explained that "[a] plaintiff is considered a prevailing party 'when actual relief on the merits of [the] claim materially alters the relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff.'" *Id.* at 420 (quoting Farrar v. Hobby, 506 U.S. 103, 111-12, 113 S. Ct. 566, 573, 121 L. Ed. 2d 494, 503 (1992)); see also Szczepanski v. Newcomb Med. Ctr., 141 N.J. 346, 355 (1995) (noting that Hensley v. Eckerhart "generously" defines "a prevailing party [a]s one who succeeds 'on any significant issue in litigation [that] achieves some of the benefit the parties sought in bringing suit'" (quoting Hensley v. Eckerhart, 461 U.S. 424, 433, 103 S. Ct. 1933, 1938, 76 L. Ed. 2d 40, 50 (1983))). The panel noted that the "form of the judgment is not entitled to conclusive weight"; rather, courts must look to whether a plaintiff's lawsuit acted as a catalyst that prompted defendant to take action and correct an unlawful practice. Warrington, *supra*, 328 N.J. Super. at 421. A settlement that confers the relief sought may still entitle plaintiff to attorney's fees in fee-shifting matters. *Id.* at 422.

This Court affirmed the catalyst theory again in 2001 when it applied the test to an attorney misconduct matter. Packard-Bamberger, *supra*, 167 N.J. at 444. In an OPRA matter several years later, New Jerseyans for a Death Penalty Moratorium v. New Jersey Department of Corrections, 185 N.J. 137, 143-44 (2005)(NJDPM), this Court directed the Department of Corrections to disclose records beyond those it had produced voluntarily. In ordering attorney's fees, the Court acknowledged the rationale underlying various fee-shifting statutes: to insure that plaintiffs are able to find lawyers to represent them; to attract competent counsel to seek redress of statutory rights; and to "even the fight" when citizens challenge a public entity. *Id.* at 153.

After Buckhannon, and after the trial court's decision in this case, the Appellate Division decided Teeters. The plaintiff in Teeters requested records from the Division of Youth and Family Services (DYFS), which DYFS declined to release. 387 N.J. Super. at 424. After the GRC preliminarily found in plaintiff's favor, the parties reached a settlement

agreement leaving open whether plaintiff was a "prevailing party" under OPRA. *Id.* at 426-27.

The Appellate Division declined to follow Buckhannon and held that plaintiff was a "prevailing party" entitled to reasonable attorney's fees; in line with the catalyst theory, plaintiff's complaint brought about an alteration in DYFS's position, and she received a favorable result through the settlement reached. *Id.* at 431-34. In rejecting Buckhannon, the panel noted that "New Jersey statutes have a different tone and flavor" than federal fee-shifting laws. *Id.* at 430. "Both the language of our statutes and the terms of court decisions in this State dealing with the issue of counsel fee entitlements support a more indulgent view of petitioner's claim for an attorney's fee award than was allowed by the majority in Buckhannon . . . ." *Id.* at 431, 904 A.2d 747. As support for this proposition, the panel surveyed OPRA, Packard-Bamberger, Warrington, and other cases.

OPRA itself contains broader language on attorney's fees than the former RTKL did. OPRA provides that "[a] requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee." N.J.S.A. 47:1A-6. Under the prior RTKL, "[a] plaintiff in whose favor such an order [requiring access to public records] issues . . . may be awarded a reasonable attorney's fee not to exceed \$ 500.00." N.J.S.A. 47:1A-4 (repealed 2002). The Legislature's revisions therefore: (1) mandate, rather than permit, an award of attorney's fees to a prevailing party; and (2) eliminate the \$ 500 cap on fees and permit a reasonable, and quite likely higher, fee award.<sup>7</sup> Those changes expand counsel fee awards under OPRA." Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51, 73-76 (2008).

The court in Mason, *supra*, at 76, held that "requestors are entitled to attorney's fees under OPRA, absent a judgment or an enforceable consent decree, when they can demonstrate (1) 'a factual causal nexus between plaintiff's litigation and the relief ultimately achieved'; and (2) 'that the relief ultimately secured by plaintiffs had a basis in law.'" Singer v. State, 95 N.J. 487, 495, cert denied (1984)."

In Mason, the plaintiff submitted an OPRA request on February 9, 2004. Hoboken responded on February 20, eight business days later, or one day beyond the statutory limit. *Id.* at 79. As a result, the Court shifted the burden to Hoboken to prove that the plaintiff's lawsuit, filed on March 4, was not the catalyst behind the City's voluntary disclosure. *Id.* Because Hoboken's February 20 response included a copy of a memo dated February 19 -- the seventh business day -- which advised that one of the requested records should be available on February 27 and the other one week later, the Court determined that the plaintiff's lawsuit was not the catalyst for the release of the records and found that she was not entitled to an award of prevailing party attorney fees. *Id.* at 80.

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<sup>7</sup> The significance of awarding fees to "requestors" and not "plaintiffs" is less clear because OPRA's fee-shifting provision refers both to individuals filing suit in Superior Court and those choosing the GRC's more information mediation route; the phrase "requestors" may simply have been used to encompass both groups. Likewise, one cannot obtain an "order" from the GRC, so the absence of that language in OPRA is not necessarily revealing.

In this complaint, the Custodian initially denied access to the requested records stating that same were not available at the time of the Complainant's OPRA request. In the Denial of Access Complaint, the Complainant's Counsel requests the following relief:

1. A determination ordering the District to provide the requested executive session meeting minutes, subject to lawful redactions;
2. A determination that the District violated OPRA by not providing access to the executive session meeting minutes when such was requested and by not requesting additional time to redact the minutes;
3. A determination that the Complainant is a prevailing party in this matter and is entitled to prevailing party attorney's fees pursuant to N.J.S.A. 47:1A-6.

In its April 28, 2010 Interim Order, the GRC held that the Custodian had responded insufficiently by not stating whether the minutes responsive were approved by the governing body at the time of the request, that the Custodian unlawfully denied access to said minutes because they had been approved by the Board of Education and ordered the minutes to be provided for an *in camera* review.

Subsequent to the *in camera* review, the GRC ordered the Custodian to disclose the requested minutes with appropriate redactions to the Complainant. *See* Council's August 24, 2010 Interim Order. The Custodian provided certified confirmation on September 2, 2010 that she disclosed the requested records with appropriate redactions to the Complainant and Complainant's Counsel via e-mail, facsimile and U.S. mail. Based on the foregoing facts, the Complainant achieved his goal of gaining access to the request records, subject to appropriate redactions, per the Complainant Counsel's requested relief in the Denial of Access Complaint.

Therefore, pursuant to Teeters, *supra*, and the Council's April 28, 2010 and August 24, 2010 Interim Orders, the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." *Id.* at 432. Additionally, pursuant to Mason, *supra*, a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6, Teeters, *supra*, and Mason, *supra*. Thus, this complaint should be referred to the Office of Administrative Law for the determination of reasonable prevailing party attorney's fees.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. The Custodian timely complied with the Council's August 24, 2010 Interim Order by providing access to the requested records containing the redactions specified in the Council's Order to the Complainant and provided certified confirmation to the GRC within the extending time frame to comply.



2. Although the Custodian violated N.J.S.A. 47:1A-5.g. by providing an insufficient response to the Complainant's request and failed to bear her burden of proving a lawful denied access to the requested executive session meeting minutes (which were officially approved by the Board at the time of the Complainant's OPRA request) pursuant to N.J.S.A. 47:1A-6, the Custodian timely complied with the Council's April 28, 2010 Interim Order and disclosed the requested executive session minutes with redactions determined to be appropriate by the Council pursuant to the Council's August 24, 2010 Interim Order. Therefore, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.
  
3. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), and the Council's April 28, 2010 and August 24, 2010 Interim Orders, the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." *Id.* at 432. Additionally, pursuant to Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6, Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), and Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Thus, this complaint should be referred to the Office of Administrative Law for the determination of reasonable prevailing party attorney's fees.

Prepared By: Frank F. Caruso  
Senior Case Manager

Approved By: Catherine Starghill, Esq.  
Executive Director

October 19, 2010



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

CHRIS CHRISTIE  
Governor

KIM GUADAGNO  
Lt. Governor

LORI GRIFA  
Commissioner

INTERIM ORDER

August 24, 2010 Government Records Council Meeting

Jesse Wolosky  
Complainant

Complaint No. 2009-94

v.

Andover Regional School District (Sussex)  
Custodian of Record

At the August 24, 2010 public meeting, the Government Records Council ("Council") considered the August 21, 2010 *In Camera* Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian has complied with the Council's April 28, 2010 Interim Order by providing the Council with all records set forth in Paragraph 3 of the Order within five (5) business days of receiving the Council's Order.
2. **On the basis of the Council's determination in this matter, the Custodian shall comply with the Council's Findings of the *In Camera* Examination set forth in the above table within five (5) business days from receipt of this Order and simultaneously provide certified confirmation of compliance pursuant to N.J. Court Rule, 1969 R. 1:4-4 (2005) to the Executive Director.**

Specifically, the Custodian must disclose records as follows:

- (1) **Executive Session from September 16, 2008 – Sewer Plan/Wastewater Treatment Plan. The Custodian must disclose the first (1<sup>st</sup>) sentence under this section heading.**
- (2) **Executive Session from September 16, 2008 – Student Issue. The Custodian must disclose the last two (2) sentences under this section heading.**
- (3) **Executive Session from October 7, 2008 – Negotiations. The Custodian must disclose the first (1<sup>st</sup>) sentence under this section heading.**
- (4) **Executive Session from October 7, 2008 – Long-Term Substitute. The Custodian must disclose this entire discussion.**



- (5) **Executive Session from October 7, 2008 – Student Issue. The Custodian must disclose this entire discussion except for the student identification number (for privacy concerns) and the date, both included in the first (1<sup>st</sup>) sentence of this discussion.**
  - (6) **Executive Session from November 4, 2008 – Student Matter. The Custodian must disclose this entire discussion except for the student identification number (for privacy concerns) included in the first (1<sup>st</sup>) sentence of this discussion.**
  - (7) **Executive Session from November 18, 2008 – Paraprofessionals Negotiations. The Custodian must disclose the first (1<sup>st</sup>) sentence under this section heading.**
  - (8) **Executive Session from December 2, 2008 – Sewer Plant. The Custodian must disclose the first (1<sup>st</sup>) sentence under this section heading.**
  - (9) **Executive Session from December 2, 2008 – Negotiations. The Custodian must disclose the first (1<sup>st</sup>) sentence under this section heading.**
  - (10) **Executive Session from December 16, 2008 – Negotiations. The Custodian must disclose the first (1<sup>st</sup>) sentence up to the word “on” under this section heading.**
3. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian’s compliance with the Council’s Interim Order.
  4. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian’s compliance with the Council’s Interim Order.

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

Robin Berg Tabakin, Chair  
Government Records Council

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

Stacy Spera, Secretary  
Government Records Council

**Decision Distribution Date: August 26, 2010**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

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

**Jesse Wolosky<sup>1</sup>  
Complainant**

**GRC Complaint No. 2009-94**

v.

**Andover Regional School District (Sussex)<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:** Approved executive session meeting minutes for September, October, November and December 2008.<sup>3</sup>

**Request Made:** February 4, 2009

**Response Made:** February 4, 2009

**Custodian:** Terry Van Auken

**GRC Complaint Filed:** March 16, 2009<sup>4</sup>

**Records Submitted for *In Camera* Examination:** Executive Session Minutes for the following dates:

- (1) September 16, 2008
- (2) October 7, 2008
- (3) October 21, 2008
- (4) November 4, 2008
- (5) November 18, 2008
- (6) December 2, 2008
- (7) December 16, 2008

**Background**

**April 28, 2010**

Government Records Council's Interim Order. At the April 28, 2010 public meeting, the Government Records Council ("Council") considered the April 21, 2010 Executive Director's Findings and Recommendations and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council therefore found that:

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

<sup>2</sup> Represented by Allan Dzwilewski, Esq., of Schwartz, Simon, Edelstein, Celso & Kessler (Morristown, NJ).

<sup>3</sup> The Complainant requested additional records that are not at issue in the instant complaint.

<sup>4</sup> The GRC received the Denial of Access Complaint on said date.

1. The Custodian's response to the Complainant's OPRA request was insufficient because she failed to specifically state whether the requested executive session meeting minutes were approved by the governing body at the time of the Complainant's request pursuant to N.J.S.A. 47:1A-5.g. and Paff v. Township of Berkeley Heights (Union), GRC Complaint No. 2007-271 (November 2008).
2. Because the requested executive session meeting minutes were approved by the Andover Regional School District Board of Education at the time of the Complainant's OPRA request and did not constitute advisory, consultative or deliberative material pursuant to N.J.S.A. 47:1A-1.1., the Custodian has unlawfully denied access to the requested executive session meeting minutes. Further, the Custodian has failed to bear her burden of proving a lawful denial of access to the requested executive session meeting minutes pursuant to N.J.S.A. 47:1A-6.
3. Pursuant to Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005), the GRC must conduct an *in camera* review of the seven (7) records responsive to determine the validity of the Custodian's assertion that the record constitutes inter-agency or intra-agency advisory, consultative or deliberative material which is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1.:
  - September 16, 2008 executive session meeting minutes.
  - October 7, 2008 executive session meeting minutes.
  - October 21, 2008 executive session meeting minutes.
  - November 4, 2008 executive session meeting minutes.
  - November 18, 2008 executive session meeting minutes.
  - December 2, 2008 executive session meeting minutes.
  - December 16, 2008 executive session meeting minutes.
4. **The Custodian must deliver<sup>5</sup> to the Council in a sealed envelope nine (9) copies of the requested unredacted document (see No. 3 above), a document or redaction index<sup>6</sup>, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4<sup>7</sup>, that the document provided is the document requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**
5. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the

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

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

<sup>7</sup> "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."

circumstances pending the Custodian's compliance with the Council's Interim Order.

6. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

#### **April 28, 2010**

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

#### **May 5, 2010**

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

- (1) document index, and
- (2) nine (9) copies of unredacted executive session minutes for September 16, 2008, October 7, 2008, October 21, 2008, November 4, 2008, November 18, 2008, December 2, 2008 and December 16, 2008.

#### **June 28, 2010**

Letter from the Complainant's Counsel to the GRC. The Complainant's Counsel asks the GRC whether the Custodian responded to the Council's April 28, 2010 Interim Order by providing the requested executive session minutes. The Complainant's Counsel requests a copy of any correspondence from the Custodian complying with the Council's Order.

#### **June 29, 2010**

E-mail from the GRC to the Complainant's Counsel. The GRC informs the Complainant's Counsel that the Custodian responded to the Council's April 28, 2010 Interim Order by providing the requested executive session minutes on May 5, 2010 and attaches a copy of the cover letter of such correspondence from the Custodian.

### **Analysis**

#### **Whether the Custodian complied with the Council's April 28, 2010 Interim Order?**

At its April 28, 2010 public meeting, the Council determined that because the Custodian has asserted that the requested records were lawfully redacted because the redacted discussions are exempt from disclosure as advisory, consultative or deliberative material pursuant to N.J.S.A. 47:1A-1.1., the Council must determine whether the legal conclusion asserted by the Custodian is properly applied to the records at issue pursuant to Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005). Therefore, the GRC must conduct an *in camera* review of the requested executive session minutes to determine the validity of the Custodian's assertion that the requested records were properly redacted.

The Council therefore ordered the Custodian to deliver to the Council in a sealed envelope nine (9) copies of the requested unredacted documents, a document or redaction index, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4, that the documents provided are the documents requested by the Council for the *in*

*camera* inspection. Such delivery was to be received by the GRC within five (5) business days from receipt of the Council's Interim Order or on May 5, 2010.

The Custodian provided the GRC with a legal certification, the unredacted records requested for the *in camera* inspection and a redaction index<sup>8</sup> on May 5, 2010. Therefore, the Custodian timely complied with the Council's April 28, 2010 Interim Order.

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

The Custodian certified that he lawfully denied the Complainant access to the requested records because some discussions contained within the executive session minutes were exempt from disclosure as advisory, consultative or deliberative material pursuant to N.J.S.A. 47:1A-1.1. and were sent to the District Superintendent and Custodian's Counsel for review before the minutes could be released to the Complainant. Further, the Custodian certified that the executive session meeting minutes responsive were and are prepared by the District with the language "[t]his matter remains confidential due to [ACD] materials not subject to public disclosure,"<sup>9</sup> in the areas of personnel matters, litigation and/or student matters which remain ongoing. The Custodian certified that the redacted executive session meeting minutes requested were provided to both the GRC and the Complainant on January 8, 2010.

Conversely, the Complainant's Counsel contends that the executive session meeting minutes requested by the Complainant were approved by the BOE and should have been provided within seven (7) business days as required by N.J.S.A. 47:1A-5.i. Counsel notes that although the minutes may contain information that is not currently subject to disclosure, the Custodian is still obligated to provide the requested records with appropriate redactions and a written explanation setting forth the lawful basis for each redaction. Paff v. Township of Plainsboro, GRC Complaint No. 2005-29 (March 2006) and Paff v. Borough of Lavallette (Ocean), GRC Complaint No. 2007-209 (December 2008).

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

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

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<sup>8</sup> The Custodian submitted a document/redaction index which identified each executive session minutes provided to the GRC, but the index failed to state the lawful basis for the redactions of each.

<sup>9</sup> This sentence replaces all of the information contained under each heading, as evidenced by the Complainant in his January 12, 2010 e-mail to the GRC.

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 record. The results of this examination are set forth in the following table:

Record or Redaction Number	Record Name/Date	Description of Record or Redaction	Custodian's Explanation/ Citation for Non-disclosure or Redactions	Findings of the <i>In Camera</i> Examination <sup>10</sup>
1)	Executive Session Minutes from September 16, 2008	Executive Session Minutes redacted for advisory, consultative or deliberative material pursuant to <u>N.J.S.A. 47:1A-1.1.</u>	The Custodian certifies that the executive session meeting minutes responsive were and are prepared by the District with the language "[t]his matter remains confidential due to [ACD] materials not subject to public disclosure," in the areas of personnel matters,	<u>Sewer Plant/Wastewater Treatment Plant:</u> The first (1 <sup>st</sup> ) sentence is not exempt from disclosure under OPRA. The remaining discussion is exempt from disclosure under OPRA pursuant to <u>N.J.S.A. 47:1A-1.1.</u> as ACD because it includes a pre-decisional issue. This matter is not resolved and the School District

<sup>10</sup> **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.

			<p>litigation and/or student matters which remain ongoing.</p>	<p>appears in negotiation with a regulating authority to resolve the matter.</p> <p><b>The Custodian must disclose the first (1<sup>st</sup>) sentence under this section heading.</b></p> <p><u>Student Issue:</u> Only the first (1<sup>st</sup>) sentence in this discussion is exempt from disclosure under OPRA pursuant to <u>N.J.S.A. 47:1A- 1.</u> (for privacy concerns) because it contains student identifying information and <u>N.J.S.A. 47:1A - 9.a.</u> (allowing exempts from other state statutes) and <u>N.J.S.A. 2A-4A- 60</u> for the confidentiality of juvenile information. Specifically, <u>N.J.S.A. 2A-4A- 60.a.</u> provides that social, medical, psychological, legal and other records of the court and probation division, and records of law enforcement</p>
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				<p>agencies, pertaining to juveniles charged as a delinquent or found to be part of a juvenile-family crisis, shall be strictly safeguarded from public inspection. Further, <u>N.J.S.A. 2A-4A-60.e.</u> provides that nothing in this section prohibits a law enforcement or prosecuting agency from providing the principal of a school with information identifying one or more juveniles who are under investigation or have been taken into custody for commission of any act that would constitute an offense if committed by an adult when the law enforcement or prosecuting agency determines that the information may be useful to the principal in maintaining order, safety or discipline in the school or in planning programs relevant to the juvenile's educational and</p>
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				<p>social development. <i>Information provided to the principal pursuant to this subsection shall be treated as confidential but may be made available to such members of the staff and faculty of the school as the principal deems appropriate for maintaining order, safety or discipline in the school or for planning programs relevant to the juvenile's educational and social development.</i> No information provided pursuant to this section shall be maintained. (Emphasis added.) Also, <u>N.J.S.A. 2A-4A-60.h.</u> provides that whoever, except as provided by law, knowingly discloses, publishes, receives, or makes use of or knowingly permits the unauthorized use of information concerning a particular juvenile derived from</p>
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				<p>records listed in subsection a. or acquired in the course of court proceedings, probation, or police duties, shall, upon conviction thereof, be guilty of a disorderly persons offense.</p> <p><b>The Custodian must disclose the last two (2) sentences under this section heading.</b></p>
2)	Executive Session Minutes from October 7, 2008	Executive Session Minutes redacted for advisory, consultative or deliberative material pursuant to <u>N.J.S.A. 47:1A-1.1.</u>	The Custodian certifies that the executive session meeting minutes responsive were and are prepared by the District with the language “[t]his matter remains confidential due to [ACD] materials not subject to public disclosure,” in the areas of personnel matters, litigation and/or student matters which remain ongoing.	<p><u>Potential Litigation</u>: This discussion is exempt from disclosure under OPRA pursuant to <u>N.J.S.A. 47:1A-9.a.</u> (allowing exemptions from other state statutes) and <u>N.J.S.A. 10:4</u> (the Open Public Meetings Act) which provides that a public body may exclude the public only from that portion of a meeting at which the public body discusses: <i>Any pending or anticipated litigation or contract negotiation other than in subsection b. (4) herein in</i></p>

				<p>which the public body is, or may become a party. Any matters falling within the attorney-client privilege, to the extent that confidentiality is required in order for the attorney to exercise his ethical duties as a lawyer. <u>N.J.S.A. 10:4-12(b)(7)</u>. (Emphasis added).</p> <p><u>Negotiations</u>: The first (1<sup>st</sup>) sentence is not exempt from disclosure.</p> <p>The remaining discussion is exempt from disclosure under OPRA pursuant to <u>N.J.S.A. 47:1A-9.a.</u> (allowing exemptions from other state statutes) and <u>N.J.S.A. 10:4</u> (the Open Public Meetings Act) which provides that a public body may exclude the public only from that portion of a meeting at which the public body discusses:  Any pending or anticipated litigation or <i>contract negotiation other</i></p>
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				<p><i>than in subsection b. (4) herein in which the public body is, or may become a party. Any matters falling within the attorney-client privilege, to the extent that confidentiality is required in order for the attorney to exercise his ethical duties as a lawyer. N.J.S.A. 10:4-12(b)(7). (Emphasis added).</i></p> <p><b>The Custodian must disclose the first (1<sup>st</sup>) sentence under this section heading.</b></p> <p><u>Long-Term Substitute:</u> This discussion is not exempt from disclosure under OPRA because the there is no information contained in that discussion which is covered by any exemption in OPRA or any other statute. Further, the identity of the one student name is sufficiently maintained confidential by the school district's use of the</p>
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				<p>student's initials.</p> <p><b>The Custodian must disclose this entire discussion.</b></p>
3)	Executive Session Minutes from October 21, 2008	Executive Session Minutes redacted for advisory, consultative or deliberative material pursuant to <u>N.J.S.A. 47:1A-1.1.</u>	The Custodian certifies that the executive session meeting minutes responsive were and are prepared by the District with the language "[t]his matter remains confidential due to [ACD] materials not subject to public disclosure," in the areas of personnel matters, litigation and/or student matters which remain ongoing.	<p><u>Sewer Plant/Wastewater Treatment Plant:</u> A portion of the first (1<sup>st</sup>) sentence of this discussion (before the "...") is not exempt from disclosure under OPRA. The remaining discussion is exempt from disclosure under OPRA pursuant to <u>N.J.S.A. 47:1A-1.1.</u> as ACD because it includes a pre-decisional issue. This matter is not resolved and the School District appears in negotiation with a regulating authority to resolve the matter.</p> <p><u>Student Issue:</u> The student identification number (for privacy concerns) in the first (1<sup>st</sup>) sentence is exempt from disclosure under OPRA pursuant to <u>N.J.S.A. 47:1A-1.</u> The remainder of this discussion is not exempt from</p>

				<p>discussion under OPRA.</p> <p><b>The Custodian must disclose this entire discussion except for the student identification number (for privacy concerns) in the first (1<sup>st</sup>) sentence of this discussion.</b></p>
4)	Executive Session Minutes from November 4, 2008	Executive Session Minutes redacted for advisory, consultative or deliberative material pursuant to <u>N.J.S.A. 47:1A-1.1.</u>	The Custodian certifies that the executive session meeting minutes responsive were and are prepared by the District with the language “[t]his matter remains confidential due to [ACD] materials not subject to public disclosure,” in the areas of personnel matters, litigation and/or student matters which remain ongoing.	<u>Collection of Funds from NJ School Development Authority:</u> This discussion is exempt from disclosure under OPRA pursuant to <u>N.J.S.A. 47:1A-1.1.</u> as ACD because it includes a pre-decisional issue. This matter is not resolved and the School District appears in negotiation with a regulating authority to resolve the matter. Additionally, this discussion is exempt from disclosure under OPRA pursuant to <u>N.J.S.A. 47:1A-9.a.</u> (allowing exemptions from other state statutes) and <u>N.J.S.A. 10:4</u> (the

				<p>Open Public Meetings Act) which provides that a public body may exclude the public only from that portion of a meeting at which the public body discusses:</p> <p>Any pending or anticipated litigation or <i>contract negotiation other than in subsection b. (4) herein in which the public body is, or may become a party.</i></p> <p>Any matters falling within the attorney-client privilege, to the extent that confidentiality is required in order for the attorney to exercise his ethical duties as a lawyer. <u>N.J.S.A. 10:4-12(b)(7).</u> (Emphasis added).</p> <p><u>A.R.P.S.A. Negotiations:</u> This discussion is exempt from disclosure under OPRA pursuant to <u>N.J.S.A. 47:1A-9.a.</u> (allowing exemptions from other state statutes) and <u>N.J.S.A. 10:4</u> (the Open Public</p>
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				<p>Meetings Act) which provides that a public body may exclude the public only from that portion of a meeting at which the public body discusses:</p> <p>Any pending or anticipated litigation or <i>contract negotiation other than in subsection b. (4) herein in which the public body is, or may become a party.</i></p> <p>Any matters falling within the attorney-client privilege, to the extent that confidentiality is required in order for the attorney to exercise his ethical duties as a lawyer. <u>N.J.S.A. 10:4-12(b)(7)</u>. (Emphasis added).</p> <p><u>Student Matter:</u> The student identification number (for privacy concerns) in the first (1<sup>st</sup>) is exempt from disclosure under OPRA pursuant to <u>N.J.S.A. 47:1A-1</u>. The remainder of this discussion is not exempt from discussion under OPRA.</p>
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				<b>The Custodian must disclose this entire discussion except for the student identification number (for privacy concerns) included in the first (1<sup>st</sup>) sentence of this discussion.</b>
5)	Executive Session Minutes from November 18, 2008	Executive Session Minutes redacted for advisory, consultative or deliberative material pursuant to <u>N.J.S.A. 47:1A-1.1.</u>	The Custodian certifies that the executive session meeting minutes responsive were and are prepared by the District with the language “[t]his matter remains confidential due to [ACD] materials not subject to public disclosure,” in the areas of personnel matters, litigation and/or student matters which remain ongoing.	<u>Paraprofessionals Negotiations</u> : The first (1 <sup>st</sup> ) sentence of this discussion is not exempt from disclosure under OPRA.  The second (2 <sup>nd</sup> ) sentence of this discussion is exempt from disclosure under OPRA pursuant to <u>N.J.S.A. 47:1A-9.a.</u> (allowing exemptions from other state statutes) and <u>N.J.S.A. 10:4</u> (the Open Public Meetings Act) which provides that a public body may exclude the public only from that portion of a meeting at which the public body discusses: Any pending or anticipated litigation or <i>contract</i>

				<p><i>negotiation other than in subsection b. (4) herein in which the public body is, or may become a party. Any matters falling within the attorney-client privilege, to the extent that confidentiality is required in order for the attorney to exercise his ethical duties as a lawyer. <u>N.J.S.A. 10:4-12(b)(7)</u>. (Emphasis added).</i></p> <p><b>The Custodian must disclose the first (1<sup>st</sup>) sentence under this section heading.</b></p>
6)	Executive Session Minutes from December 2, 2008	Executive Session Minutes redacted for advisory, consultative or deliberative material pursuant to <u>N.J.S.A. 47:1A-1.1</u> .	The Custodian certifies that the executive session meeting minutes responsive were and are prepared by the District with the language “[t]his matter remains confidential due to [ACD] materials not subject to public disclosure,” in the areas of personnel matters,	<u>Sewer Plant</u> : The first (1 <sup>st</sup> ) sentence is not exempt from disclosure under OPRA. The remaining discussion is exempt from disclosure under OPRA as ACD pursuant <u>N.J.S.A. 47:1A-1.1</u> . because it includes a pre-decisional issue. This matter is not resolved and the School District appears in negotiation with a regulating

			<p>litigation and/or student matters which remain ongoing.</p>	<p>authority to resolve the matter.</p> <p><b>The Custodian must disclose the first (1<sup>st</sup>) sentence under this section heading.</b></p> <p><u>Negotiations</u>: The first (1<sup>st</sup>) sentence is not exempt from disclosure under OPRA. The remaining discussion is exempt from disclosure under OPRA pursuant to <u>N.J.S.A. 47:1A-9.a.</u> (allowing exemptions from other state statutes) and <u>N.J.S.A. 10:4</u> (the Open Public Meetings Act) which provides that a public body may exclude the public only from that portion of a meeting at which the public body discusses:  Any pending or anticipated litigation or <i>contract negotiation other than in subsection b. (4) herein in which the public body is, or may become a party.</i>  Any matters falling within the</p>
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				<p>attorney-client privilege, to the extent that confidentiality is required in order for the attorney to exercise his ethical duties as a lawyer. <u>N.J.S.A. 10:4-12(b)(7)</u>. (Emphasis added).</p> <p><b>The Custodian must disclose the first (1<sup>st</sup>) sentence under this section heading.</b></p> <p><u>School Business Administrator/ Board Secretary Agreement</u>: This discussion is exempt from disclosure under OPRA pursuant to <u>N.J.S.A. 47:1A-9.a.</u> (allowing exemptions from other state statutes) and <u>N.J.S.A. 10:4</u> (the Open Public Meetings Act) which provides that a public body may exclude the public only from that portion of a meeting at which the public body discusses:  Any pending or anticipated litigation or <i>contract negotiation other</i></p>
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				<p><i>than in subsection b. (4) herein in which the public body is, or may become a party. Any matters falling within the attorney-client privilege, to the extent that confidentiality is required in order for the attorney to exercise his ethical duties as a lawyer. <u>N.J.S.A. 10:4-12(b)(7)</u>. (Emphasis added).</i></p>
7)	Executive Session Minutes from December 16, 2008	Executive Session Minutes redacted for advisory, consultative or deliberative material pursuant to <u>N.J.S.A. 47:1A-1.1</u> .	The Custodian certifies that the executive session meeting minutes responsive were and are prepared by the District with the language “[t]his matter remains confidential due to [ACD] materials not subject to public disclosure,” in the areas of personnel matters, litigation and/or student matters which remain ongoing.	<p><u>Negotiations</u>: The portion of the first (1<sup>st</sup>) sentence up to the word “on” is not exempt from disclosure under OPRA. The remaining discussion is exempt from disclosure under OPRA pursuant to <u>N.J.S.A. 47:1A-9.a.</u> (allowing exemptions from other state statutes) and <u>N.J.S.A. 10:4</u> (the Open Public Meetings Act) which provides that a public body may exclude the public only from that portion of a meeting at which the public body discusses: Any pending or</p>

				<p>anticipated litigation or contract negotiation other than in subsection b. (4) herein in which the public body is, or may become a party. Any matters falling within the attorney-client privilege, to the extent that confidentiality is required in order for the attorney to exercise his ethical duties as a lawyer. <u>N.J.S.A. 10:4-12(b)(7)</u>. (Emphasis added).</p> <p><b>The Custodian must disclose the first (1<sup>st</sup>) sentence up to the word “on” under this section heading.</b></p> <p><u>School Business Administrator/ Business Secretary Agreement</u>: This discussion is exempt from disclosure under OPRA pursuant to <u>N.J.S.A. 47:1A-9.a.</u> (allowing exemptions from other state statutes) and <u>N.J.S.A. 10:4</u> (the Open Public Meetings Act)</p>
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				<p>which provides that a public body may exclude the public only from that portion of a meeting at which the public body discusses:</p> <p>Any pending or anticipated litigation or <i>contract negotiation other than in subsection b. (4) herein in which the public body is, or may become a party.</i></p> <p>Any matters falling within the attorney-client privilege, to the extent that confidentiality is required in order for the attorney to exercise his ethical duties as a lawyer. <u>N.J.S.A. 10:4-12(b)(7)</u>. (Emphasis added).</p>
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Thus, the Custodian unlawfully denied access to some of the redacted discussions in the requested executive session minutes. Specifically, the Custodian must disclose the following:

- (1) Executive Session from September 16, 2008 – Sewer Plan/Wastewater Treatment Plan. The Custodian must disclose the first (1<sup>st</sup>) sentence under this section heading.
- (2) Executive Session from September 16, 2008 – Student Issue. The Custodian must disclose the last two (2) sentences under this section heading.
- (3) Executive Session from October 7, 2008 – Negotiations. The Custodian must disclose the first (1<sup>st</sup>) sentence under this section heading.
- (4) Executive Session from October 7, 2008 – Long-Term Substitute. The Custodian must disclose this entire discussion.

- (5) Executive Session from October 7, 2008 – Student Issue. The Custodian must disclose this entire discussion except for the student identification number (for privacy concerns) and the date, both included in the first (1<sup>st</sup>) sentence of this discussion.
- (6) Executive Session from November 4, 2008 – Student Matter. The Custodian must disclose this entire discussion except for the student identification number (for privacy concerns) included in the first (1<sup>st</sup>) sentence of this discussion.
- (7) Executive Session from November 18, 2008 – Paraprofessionals Negotiations. The Custodian must disclose the first (1<sup>st</sup>) sentence under this section heading.
- (8) Executive Session from December 2, 2008 – Sewer Plant. The Custodian must disclose the first (1<sup>st</sup>) sentence under this section heading.
- (9) Executive Session from December 2, 2008 – Negotiations. The Custodian must disclose the first (1<sup>st</sup>) sentence under this section heading.
- (10) Executive Session from December 16, 2008 – Negotiations. The Custodian must disclose the first (1<sup>st</sup>) sentence up to the word “on” under this section heading.

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

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

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

The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian’s compliance with the Council’s Interim Order.

**Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. The Custodian has complied with the Council’s April 28, 2010 Interim Order by providing the Council with all records set forth in Paragraph 3 of the Order within five (5) business days of receiving the Council’s Order.
2. **On the basis of the Council’s determination in this matter, the Custodian shall comply with the Council’s Findings of the *In Camera* Examination set forth in the above table within five (5) business days from receipt of this Order and simultaneously provide certified confirmation of compliance pursuant to N.J. Court Rule, 1969 R. 1:4-4 (2005) to the Executive Director.**

Specifically, the Custodian must disclose records as follows:

- (1) **Executive Session from September 16, 2008 – Sewer Plan/Wastewater Treatment Plan.** The Custodian must disclose the first (1<sup>st</sup>) sentence under this section heading.
  - (2) **Executive Session from September 16, 2008 – Student Issue.** The Custodian must disclose the last two (2) sentences under this section heading.
  - (3) **Executive Session from October 7, 2008 – Negotiations.** The Custodian must disclose the first (1<sup>st</sup>) sentence under this section heading.
  - (4) **Executive Session from October 7, 2008 – Long-Term Substitute.** The Custodian must disclose this entire discussion.
  - (5) **Executive Session from October 7, 2008 – Student Issue.** The Custodian must disclose this entire discussion except for the student identification number (for privacy concerns) and the date, both included in the first (1<sup>st</sup>) sentence of this discussion.
  - (6) **Executive Session from November 4, 2008 – Student Matter.** The Custodian must disclose this entire discussion except for the student identification number (for privacy concerns) included in the first (1<sup>st</sup>) sentence of this discussion.
  - (7) **Executive Session from November 18, 2008 – Paraprofessionals Negotiations.** The Custodian must disclose the first (1<sup>st</sup>) sentence under this section heading.
  - (8) **Executive Session from December 2, 2008 – Sewer Plant.** The Custodian must disclose the first (1<sup>st</sup>) sentence under this section heading.
  - (9) **Executive Session from December 2, 2008 – Negotiations.** The Custodian must disclose the first (1<sup>st</sup>) sentence under this section heading.
  - (10) **Executive Session from December 16, 2008 – Negotiations.** The Custodian must disclose the first (1<sup>st</sup>) sentence up to the word “on” under this section heading.
3. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian’s compliance with the Council’s Interim Order.
  4. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian’s compliance with the Council’s Interim Order.

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

August 21, 2010



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

CHRIS CHRISTIE  
Governor

KIM GUADAGNO  
Lt. Governor

LORI GRIFA  
Acting Commissioner

**INTERIM ORDER**

**April 28, 2010 Government Records Council Meeting**

Jesse Wolosky  
Complainant

Complaint No. 2009-94

v.

Andover Regional School District (Sussex)  
Custodian of Record

At the April 28, 2010 public meeting, the Government Records Council (“Council”) considered the April 21, 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 response to the Complainant’s OPRA request was insufficient because she failed to specifically state whether the requested executive session meeting minutes were approved by the governing body at the time of the Complainant’s request pursuant to N.J.S.A. 47:1A-5.g. and Paff v. Township of Berkeley Heights (Union), GRC Complaint No. 2007-271 (November 2008).
2. Because the requested executive session meeting minutes were approved by the Andover Regional School District Board of Education at the time of the Complainant’s OPRA request and did not constitute advisory, consultative or deliberative material pursuant to N.J.S.A. 47:1A-1.1., the Custodian has unlawfully denied access to the requested executive session meeting minutes. Further, the Custodian has failed to bear her burden of proving a lawful denial of access to the requested executive session meeting minutes pursuant to N.J.S.A. 47:1A-6.
3. Pursuant to Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005), the GRC must conduct an *in camera* review of the seven (7) records responsive to determine the validity of the Custodian’s assertion that the record constitutes inter-agency or intra-agency advisory, consultative or deliberative material which is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1.:



- September 16, 2008 executive session meeting minutes.
  - October 7, 2008 executive session meeting minutes.
  - October 21, 2008 executive session meeting minutes.
  - November 4, 2008 executive session meeting minutes.
  - November 18, 2008 executive session meeting minutes.
  - December 2, 2008 executive session meeting minutes.
  - December 16, 2008 executive session meeting minutes.
4. **The Custodian must deliver<sup>1</sup> to the Council in a sealed envelope nine (9) copies of the requested unredacted document (see No. 3 above), a document or redaction index<sup>2</sup>, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4<sup>3</sup>, that the document provided is the document requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**
  5. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
  6. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Interim Order Rendered by the  
Government Records Council  
On The 28<sup>th</sup> Day of April, 2010

Robin Berg Tabakin, Chair  
Government Records Council

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

Janice L. Kovach, Secretary  
Government Records Council

**Decision Distribution Date: April 29, 2010**

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

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

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



**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
April 28, 2010 Council Meeting**

**Jesse Wolosky<sup>1</sup>  
Complainant**

**GRC Complaint No. 2009-94**

v.

**Andover Regional School District (Sussex)<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:** Approved executive session meeting minutes for September, October, November and December 2008.<sup>3</sup>

**Request Made:** February 4, 2009

**Response Made:** February 4, 2009

**Custodian:** Terry Van Auken

**GRC Complaint Filed:** March 16, 2009<sup>4</sup>

**Background**

**February 4, 2009**

Complainant's Open Public Records Act ("OPRA") request. The Complainant requests the records relevant to this complaint listed above on an official OPRA request form. The Complainant requests that the Custodian provide the records responsive in the following delivery order of preference: 1) via e-mail or 2) via facsimile.

**February 4, 2009**

Custodian's response to the OPRA request. The Custodian responds in writing to the Complainant's OPRA request on same business day following receipt of such request. The Custodian states that access to the requested executive session meeting minutes is denied because the minutes are not available as of this date.

**February 6, 2009**

E-mail from the Complainant to the Custodian. The Complainant requests that the Custodian clarify her response stating that the minutes are not available. The Complainant requests that the Custodian advise whether any records responsive to the request exist. Further, the Complainant states that if records responsive do exist, the Custodian should advise as to the specific lawful basis for said denial of access.

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

<sup>2</sup> Represented by Allan Dzwilewski, Esq., of Schwartz, Simon, Edelstein, Celso & Kessler (Morristown, NJ).

<sup>3</sup> The Complainant requested additional records that are not at issue in the instant complaint.

<sup>4</sup> The GRC received the Denial of Access Complaint on said date.

**March 4, 2009**

E-mail from the Complainant to the Custodian. The Complainant seeks additional clarification regarding the Custodian's response. The Complainant asks whether the Andover Regional School District Board of Education ("BOE") has approved the requested executive session meeting minutes but has not yet released them.

**March 11, 2009**

E-mail from the Complainant's Counsel to the Custodian. Counsel states that he represents the Complainant and requests that the Custodian confirm that she is in receipt of the Complainant's e-mail dated February 6, 2009. Counsel states that the Complainant has not received a response to date and wanted to make sure that the February 6, 2009 e-mail was received.<sup>5</sup>

**March 11, 2009**

E-mail from the Custodian to the Complainant's Counsel. The Custodian states that the responsive executive session meeting minutes were sent to the District Superintendent and Custodian's Counsel last week for review as some of the contents may not be subject to disclosure. The Custodian states that she believes that most of the executive session meeting minutes will be provided to the Complainant either on March 12, 2009 or March 13, 2009. The Custodian states that she is awaiting the Custodian Counsel's response.

**March 16, 2009**

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

- Complainant's OPRA request dated February 4, 2009 with the Custodian's response thereon.
- E-mail from the Complainant to the Custodian dated February 6, 2009.
- E-mail from the Complainant to the Custodian dated March 4, 2009.
- E-mail from the Complainant's Counsel to the Custodian dated March 11, 2009.
- E-mail from the Custodian to the Complainant's Counsel dated March 11, 2009.<sup>6</sup>

The Complainant's Counsel states that the instant complaint was filed with the GRC because the Custodian denied access to approved executive session meeting minutes for September through December 2008.

Counsel states that the Complainant submitted an OPRA request to the District on February 4, 2009. Counsel states that according to the BOE's regular session meeting minutes, executive session meetings were held on September 16, 2008, October 7, 2008, October 21, 2008, November 4, 2008, November 18, 2008, December 2, 2008 and December 16, 2008. Counsel states that the minutes of each of these executive sessions

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<sup>5</sup> The Complainant's Counsel sent a second e-mail to the Custodian on the same day to make sure that the Complainant's e-mails were being received by the Custodian.

<sup>6</sup> The Complainant's Counsel also attached regular session meeting minutes for October 2008 through January 2009 to illustrate that all requested executive session meeting minutes were approved by the District at the time of the Complainant's OPRA request.

were approved at the following meeting, as evidenced in the regular session meeting minutes.

Counsel states that the Custodian denied access to the requested executive session meeting minutes, stating that the minutes were not available as of the date of the Custodian's response (February 4, 2009). Counsel states that after the Custodian's denial of access, the Complainant e-mailed the Custodian on February 6, 2009 and March 5, 2009 requesting clarification of the Custodian's denial of access. Counsel states that the Custodian did not respond to either e-mail.

Counsel states that he forwarded the Complainant's two (2) e-mails to the Custodian on March 11, 2009 and requested confirmation that the Custodian received both e-mails. Counsel states that the Custodian responded on March 11, 2009 advising that the requested executive session meeting minutes were forwarded to the Superintendent and Custodian's Counsel for review a week prior and would be made available by the end of the week. Counsel states that the Complainant did not receive the requested records.

Counsel states that executive session meeting minutes are public records under OPRA. N.J.S.A. 47:1A-1.1. Counsel acknowledges that although unapproved executive session meeting minutes are exempt from disclosure under OPRA as inter-agency or intra-agency advisory, consultative or deliberative ("ACD") material pursuant to Parave-Fogg v. Lower Alloways Creek Township, GRC Complaint No. 2006-51 (August 2006), once those minutes have been approved, they are public records. *See* Paff v. Borough of Roselle (Union), GRC Complaint No. 2007-255 (June 2008).

Counsel contends that the executive session meeting minutes requested by the Complainant were approved by the BOE and should have been provided within seven (7) business days as required by N.J.S.A. 47:1A-5.i. Counsel notes that although the minutes may contain information that is not currently subject to disclosure, the Custodian is still obligated to provide the requested records with appropriate redactions and a written explanation setting forth the lawful basis for each redaction. Paff v. Township of Plainsboro, GRC Complaint No. 2005-29 (March 2006) and Paff v. Borough of Lavallette (Ocean), GRC Complaint No. 2007-209 (December 2008).

Counsel requests the following relief:

1. A determination ordering the District to provide the requested executive session meeting minutes, subject to lawful redactions;
2. A determination that the District violated OPRA by not providing access to the executive session meeting minutes when such was requested and by not requesting additional time to redact the minutes;
3. A determination that the Complainant is a prevailing party in this matter and is entitled to prevailing party attorney's fees pursuant to N.J.S.A. 47:1A-6.

The Complainant does not agree to mediate this complaint.

**March 16, 2009**

E-mail from the Custodian to the Complainant with the following attachments:

- September 16, 2008 executive session meeting minutes
- October 7, 2008 executive session meeting minutes
- October 21, 2008 executive session meeting minutes
- November 4, 2008 executive session meeting minutes
- November 18, 2008 executive session meeting minutes

The Custodian states that the attached executive session meeting minutes are responsive to the Complainant's February 4, 2009 OPRA request. The Custodian states that December, 2008 executive session meeting minutes have not yet been released.

**March 17, 2009**

E-mail from the Custodian to the Complainant. The Custodian states that she provided the meeting minutes responsive to the Complainant. The Custodian states that she advised the Complainant last week that she needed permission from the Custodian's Counsel to provide the records and offered a timeline for the release of said records.

**March 31, 2009**

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

**April 7, 2009**

Custodian's SOI with the following attachments:

- Complainant's OPRA request dated February 4, 2009 with the Custodian's response thereon
- E-mail from the Complainant to the Custodian dated February 6, 2009
- E-mail from the Complainant to the Custodian dated March 4, 2009
- E-mail from the Complainant's Counsel to the Custodian dated March 11, 2009
- E-mail from the Custodian to the Complainant's Counsel dated March 11, 2009
- E-mail from the Custodian to the Complainant dated March 16, 2009
- E-mail from the Custodian to the GRC dated March 17, 2009<sup>7</sup>

The Custodian certifies that no records that may have been 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").<sup>8</sup>

The Custodian certifies that she received the Complainant's OPRA request on February 4, 2009. The Custodian certifies that she responded in writing on the same day denying access to the requested records because they were not available as of the date of the Complainant's OPRA request.

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<sup>7</sup> The Custodian provided additional documentation that is not relevant to the instant complaint.

<sup>8</sup> The Custodian did not certify to the search undertaken.

The Custodian certifies that she advised the Complainant on March 11, 2009 that the records responsive were being reviewed by the District Superintendent and Counsel and would be made available by the end of the week. The Custodian certifies that she e-mailed the Complainant on March 13, 2009<sup>9</sup> and provided access to the requested meeting minutes on March 16, 2009 and advised the Complainant on that date that the December 2008 meeting minutes had not yet been released.

#### **April 9, 2009**

E-mail from the GRC to the Custodian. The GRC states that the Custodian asserts in the SOI that records responsive to the Complainant's OPRA request were provided to the Complainant on March 13, 2009; however, there is no evidence in the record to support this assertion. The GRC requests that the Custodian provide a copy of her March 13, 2009 written correspondence to the Complainant with an accompanying legal certification.

#### **April 16, 2009**

E-mail from the Custodian to the GRC. The Custodian asserts that she e-mailed information to the Complainant on March 13, 2009 but did not save her e-mails from that day; therefore, the Custodian cannot provide a copy of the e-mail. The Custodian avers that included in the SOI is a copy of her March 16, 2009 written response sent to the Complainant at 8:43 am.

#### **January 6, 2010**

E-mail from the GRC to the Custodian. The GRC states that it needs additional information regarding the instant complaint. The GRC states that the Custodian initially denied access to the requested executive session meeting minutes on the same day as receipt of the Complainant's request. Further, the GRC states that the Custodian provided access to all of the requested meeting minutes, with the exception of the December 2008 meeting minutes, on March 16, 2009. The GRC requests that the Custodian legally certify to the following:

1. Whether all of the executive session meeting minutes responsive to the Complainant's OPRA request were approved by the District at the time of the Complainant's February 4, 2009 OPRA request?
2. Whether the Custodian is in possession of any evidence (e-mail, letter, etc.) showing that she provided access to some of the records responsive on March 13, 2009? Please provide such evidence, if any exists.

The GRC states that the requested legal certification is due by January 8, 2010.

#### **January 8, 2010**

Custodian's legal certification with the following attachments:

- September 16, 2008 executive session meeting minutes.
- October 7, 2008 executive session meeting minutes.

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<sup>9</sup> There is no evidence in the record to support the Custodian's certification that she e-mailed the Complainant on March 13, 2009.

- October 21, 2008 executive session meeting minutes.
- November 4, 2008 executive session meeting minutes.
- November 18, 2008 executive session meeting minutes.
- December 2, 2008 executive session meeting minutes.
- December 16, 2008 executive session meeting minutes.

The Custodian certifies that all of the attached executive session meeting minutes were approved by the BOE prior to the Complainant's February 4, 2009 OPRA request. The Custodian certifies that all redacted confidential information is marked "[t]his matter remains confidential due to advisory, consultative, and deliberative materials not subject to public disclosure."

Moreover, the Custodian certifies that access to the requested minutes was not granted on March 13, 2009 because the minutes were considered ACD material at that time due to District Policies and Regulations.<sup>10</sup>

### **January 12, 2010**

E-mail from the Complainant to the GRC with the following attachments:

- Custodian's legal certification dated January 8, 2010
- September 16, 2008 executive session meeting minutes
- October 7, 2008 executive session meeting minutes
- October 21, 2008 executive session meeting minutes
- November 4, 2008 executive session meeting minutes
- November 18, 2008 executive session meeting minutes
- December 2, 2008 executive session meeting minutes
- December 16, 2008 executive session meeting minutes

The Complainant states that he received the Custodian's legal certification; however, the certification was not signed and dated. The Complainant inquires whether the Custodian provided the GRC with a signed and dated copy of the legal certification.

Further, the Complainant asserts that the attached meeting minutes were specifically created for the instant complaint and do not represent the original minutes. The Complainant notes that the original minutes most likely do not contain entries similar to the following:

**"Sewer Plant/Wastewater Treatment Plant:** This matter remains confidential due to [ACD] materials not subject to public disclosure" *See* September 16, 2008 executive session meeting minutes.

The Complainant questions whether the Custodian is certifying that the attached minutes represent exact copies of the originals.

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<sup>10</sup> The Custodian forwarded a copy of this submission to the Complainant at the request of the GRC on January 12, 2010.  
 Jesse Wolosky v. Andover Regional School District (Sussex), 2009-94 – Findings and Recommendations of the Executive Director

**January 13, 2010**

E-mail from the GRC to the Complainant. The GRC confirms that it received an executed copy of the Custodian's legal certification. Additionally, the GRC states that it is referring the Complainant's issue regarding the meeting minutes provided as part of the Custodian's legal certification to the Custodian for a response.

**January 25, 2010**

E-mail from the GRC to the Custodian. The GRC states that it requested a response from the Custodian to the Complainant's issue regarding whether the executive session meeting minutes attached as part of the Custodian's January 8, 2010 legal certification were exact copies of the originals.

The GRC requests that the Custodian legally certify to whether the executive session meeting minutes provided as part of the Custodian's January 8, 2010 legal certification were exact copies of the original meeting minutes. The GRC requests that the Custodian provide her legal certification as soon as possible but no later than January 27, 2010.

**January 27, 2010**

E-mail from the Custodian to the GRC. The Custodian asserts that the response to the Complainant's question is "[y]es, that is how the executive session minutes were and are prepared."<sup>11</sup>

**January 27, 2010**

Facsimile from the GRC to the Custodian. The GRC requests that the Custodian submit her response in the form of a legal certification. The GRC includes in the transmission a copy of the guideline for composing a legal certification in order to assist the Custodian in complying with the GRC's request.

**January 27, 2010**

Custodian's legal certification. The Custodian certifies that the executive session meeting minutes responsive were and are prepared by the District with the language "[t]his matter remains confidential due to [ACD] materials not subject to public disclosure,"<sup>12</sup> in the areas of personnel matters, litigation and/or student matters which remain ongoing. The Custodian certifies that the executive session meeting minutes requested were provided to both the GRC and the Complainant on January 8, 2010.

**January 29, 2010**

E-mail from the Complainant to the GRC with the following attachments:

- September 16, 2008 executive session meeting minutes

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<sup>11</sup> The Custodian notes that she did not submit her response in the form of a legal certification because she does not know how to compose such. Further, the Custodian notes that the District's internet service recently ceased to function and is not yet 100% operational. The Custodian suggests future correspondence be sent via facsimile.

<sup>12</sup> This sentence replaces all of the information contained under each heading, as evidenced by the Complainant in his January 12, 2010 e-mail to the GRC.

- October 7, 2008 executive session meeting minutes
- October 21, 2008 executive session meeting minutes
- November 4, 2008 executive session meeting minutes
- November 18, 2008 executive session meeting minutes

The Complainant states that he contacted the GRC on January 13, 2010 requesting that the Custodian clarify whether the minutes attached to the Custodian's January 8, 2010 legal certification were the original meeting minutes responsive to the OPRA request. The Complainant states that the Custodian legally certified on January 27, 2010 that the meeting minutes provided were true and correct copies of the originals.

The Complainant contends that the meeting minutes attached proves that the Custodian falsified her certification.

### **February 1, 2010**

Letter from the Custodian to the GRC. The Custodian states that on January 27, 2010, she certified that the executive session meeting minutes provided as part of the Custodian's January 8, 2010 were the original minutes containing the language "[t]his matter remains confidential due to [ACD] materials not subject to public disclosure."

The Custodian asserts that upon being notified by the GRC that all parties shall be copied on correspondence regarding the instant complaint, the Custodian inadvertently e-mailed the Complainant files considered work documents. The Custodian contends that she stands by her certification submitted to the GRC on January 27, 2010.

## **Analysis**

### **Whether the Custodian unlawfully denied access to the requested executive session meeting minutes?**

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 ...The terms *shall not include inter-agency or intra-agency advisory, consultative, or deliberative material.*" (Emphasis added.) N.J.S.A. 47:1A-1.1.

Further, OPRA provides that:

"[i]f the custodian of a government record asserts that part of a particular record is exempt from public access pursuant to [OPRA], the custodian *shall delete or excise from a copy of the record that portion* which the



*custodian asserts is exempt from access and shall promptly permit access to the remainder of the record.”* (Emphasis added.) N.J.S.A. 47:1A-5.g.

OPRA also states 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’s response to the Complainant’s OPRA request was legally sufficient under OPRA.

The Custodian in this complaint initially responded in writing on the same day as receipt of the Complainant’s request stating that access to the requested executive session meeting minutes is denied because the minutes were not available as of that date.

In Paff v. Township of Berkeley Heights (Union), GRC Complaint No. 2007-271 (November 2008), the Custodian responded in writing on the seventeenth (17<sup>th</sup>) business day after receipt of the Complainant’s request stating that access to the requested executive session meeting minutes was denied because said minutes were “not ... resolved and are not available.” In the Denial of Access Complaint, the Complainant’s Counsel argued that the Custodian’s response failed to identify a specific citation of law or authority supporting the Custodian’s denial. The GRC held that:

“[t]he Custodian’s response to the Complainant’s OPRA request Item No. 2 was insufficient because she failed to specifically state that the requested executive session minutes were not yet approved by the governing body at the time of the Complainant’s request pursuant to N.J.S.A. 47:1A-5.g. and Paff v. City of Plainfield, GRC Complaint No. 2006-103 (February 2007).”

In the instant complaint, although the Custodian responded in a timely manner, her response mirrors that of the Custodian's response in Paff: both custodians failed to provide a specific lawful basis for the denial of access to executive session meeting minutes. Therefore, the Custodian's response to the Complainant's OPRA request was insufficient because she failed to specifically state whether the requested executive session meeting minutes were approved by the governing body at the time of the Complainant's request pursuant to N.J.S.A. 47:1A-5.g. and Paff, *supra*.

The GRC next turns to the issue of whether the requested executive session meeting minutes were subject to disclosure at the time of the Complainant's OPRA request.

The Complainant's Counsel argues in the Denial of Access Complaint that although unapproved executive session meeting minutes are exempt from disclosure under OPRA as advisory, consultative or deliberative ("ACD") material pursuant to Parave-Fogg v. Lower Alloways Creek Township, GRC Complaint No. 2006-51 (August 2006), once those minutes have been approved, they are public records. *See Paff v. Borough of Roselle (Union)*, GRC Complaint No. 2007-255 (June 2008). Counsel contends that the requested minutes were approved, as evidenced in the District's regular session meeting minutes, and should have been provided to the Complainant within seven (7) business days as required by N.J.S.A. 47:1A-5.i. Counsel further notes that although the minutes may have contained some information not currently subject to disclosure under OPRA, the Custodian was still obligated to provide the requested records with appropriate redactions and a written explanation of the legal basis for each redaction pursuant to Paff v. Township of Plainsboro, GRC Complaint No. 2005-29 (March 2006) and Paff v. Borough of Lavallette (Ocean), GRC Complaint No. 2007-209 (December 2008).

As a general matter, draft documents are advisory, consultative and deliberative communications. Although OPRA broadly defines a "government record" as records either "made, maintained or kept on file in the course of [an agency's] official business," or "received" by an agency in the course of its official business, N.J.S.A. 47:1A-1.l., the statute also excludes from this definition a variety of documents and information. *Ibid.* *See Bergen County Improvement Auth. v. North Jersey Media*, 370 N.J. Super. 504, 516 (App. Div. 2004). The statute expressly provides that "inter-agency or intra-agency advisory, consultative, or deliberative material" is not included within the definition of a government record. N.J.S.A. 47: 1A-1 .l.

The courts have consistently held that draft records of a public agency fall within the deliberative process privilege. *See U.S. v. Farley*, 11 F.3d 1385 (7<sup>th</sup> Cir. 1993); Pies v. U.S. Internal Rev. Serv., 668 F.2d 1350 (D.C. Cir. 1981); N.Y.C. Managerial Employee Ass'n. v. Dinkins, 807 F.Supp., 955 (S.D.N.Y. 1992); Archer v. Cirrincione, 722 F. Supp. 1118 (S.D. N.Y. 1989); Coalition to Save Horsebarn Hill v. Freedom of Info. Comm., 73 Conn.App. 89, 806 A.2d 1130 (Conn. App. Ct. 2002); *pet. for cert. den.* 262 Conn. 932, 815 A.2d 132 (2003). As explained in *Coalition*, the entire draft document is deliberative because in draft form, it "reflect[s] that aspect of the agency's function that precedes formal and informed decision making." *Id.* at 95, quoting Wilson v. Freedom of Info. Comm., 181 Conn. 324, 332-33, 435 A.2d 353 (1980).

The New Jersey Appellate Division also has reached this conclusion with regard to draft documents. In the unreported section of In re Readoption With Amendments of Death Penalty Regulations, 182 N.J. 149 (App. Div. 2004), the court reviewed an OPRA request to the Department of Corrections (“DOC”) for draft regulations and draft statutory revisions. The court stated that these drafts were “all clearly pre-decisional and reflective of the deliberative process.” *Id.* at 18. It further held:

“[t]he trial judge ruled that while appellant had not overcome the presumption of non-disclosure as to the entire draft, it was nevertheless entitled to those portions which were eventually adopted. Appellant appeals from the portions withheld and DOC appeals from the portions required to be disclosed. We think it plain that all these drafts, in their entirety, are reflective of the deliberative process. On the other hand, appellant certainly has full access to all regulations and statutory revisions ultimately adopted. We see, therefore, no basis justifying a conclusion that the presumption of nondisclosure has been overcome. *Ibid.* (Emphasis added.)”

Additionally, the GRC has previously ruled on the issue of whether draft meeting minutes are exempt from disclosure pursuant to OPRA. In Parave-Fogg v. Lower Alloways Creek Township, GRC Complaint No. 2006-51 (August 2006), the Council held that “...the Custodian has not unlawfully denied access to the requested meeting minutes as the Custodian certifies that at the time of the request said minutes had not been approved by the governing body and as such, they constitute inter-agency, intra-agency advisory, consultative, or deliberative material and are exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1.”

Thus, in accordance with the foregoing case law and the prior GRC decision in Parave-Fogg, *supra*, all draft minutes of a meeting held by a public body, are entitled to the protection of the deliberative process privilege. Draft minutes are pre-decisional. In addition, they reflect the deliberative process in that they are prepared as part of the public body’s decision making concerning the specific language and information that should be contained in the minutes to be adopted by that public body, pursuant to its obligation, under the Open Public Meetings Act, to “keep reasonably comprehensible minutes.” N.J.S.A. 10:4-14.

In the instant complaint, the Custodian initially denied access to the requested executive session meeting minutes stating that said minutes had not been released at the time of the request. Subsequent to the filing of this complaint, the Custodian provided access to executive session meeting minutes responsive for September, October and November, 2008, but withheld access to December 2008 meeting minutes stating that they were not yet available. However, the Custodian certified on January 8, 2010 that all meeting minutes responsive were approved by the BOE at the time of the Complainant’s OPRA request.

The Council’s holding in Parave-Fogg, *supra*, specifically states that “minutes ... not approved by the governing body ... constitute inter-agency, intra-agency advisory,

consultative, or deliberative material and are exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1.” Additionally, the Complainant’s Counsel correctly points out that N.J.S.A. 47:1A-5.g. allows for the redaction of information that is exempt under OPRA. In fact, OPRA requires the disclosure of a record with redactions of only the information which is asserted to be exempt from disclosure. A denial of access to the entire record is therefore unlawful under OPRA.

Therefore, because the requested executive session meeting minutes were approved by the BOE at the time of the Complainant’s OPRA request and did not constitute ACD material in their entirety pursuant to N.J.S.A. 47:1A-1.1., the Custodian has unlawfully denied access to the requested executive session meeting minutes. Further, the Custodian has failed to bear her burden of proving a lawful denial of access to the requested executive session meeting minutes pursuant to N.J.S.A. 47:1A-6.

The GRC next turns to the issue of whether the Custodian unlawfully redacted the records responsive to the Complainant’s OPRA request.

As part of a legal certification to the GRC on January 8, 2010, the Custodian attached all of the records responsive. The statement “[t]his matter remains confidential due to [ACD] materials not subject to public disclosure,” appeared under the headings for individual subject matters discussed in executive session. In an e-mail to the GRC dated January 12, 2010, the Complainant requested clarification regarding whether the minutes attached to the Custodian’s January 8, 2010 legal certification represented the original meeting minutes. Subsequent to the GRC’s request for a response, the Custodian certified that the minutes attached to the January 8, 2010 legal certification were true and correct copies of the originals.

However, the Complainant sent an e-mail to the GRC on January 27, 2010 attaching meeting minutes responsive for September, October and November that contained substantive material regarding each issue heading and but the sentence “[t]his matter remains confidential due to [ACD] materials not subject to public disclosure” was conspicuously not present.

Based on the evidence of record, it appears that the Custodian made electronic redactions to the meeting minutes responsive prior to disclosing such minutes to the Complainant. As previously discussed, the Complainant’s Counsel correctly pointed out that N.J.S.A. 47:1A-5.g. allows for the redaction of information that is exempt under OPRA.

Although the GRC has not previously addressed in a complaint what constitutes an appropriate redaction, guidance for properly redacting records is found in the “Handbook for Records Custodians,” posted on the GRC’s website:

“[i]f a record contains material that must be redacted, such as a social security number or unlisted phone number, *redaction must be accomplished by using a visually obvious method that shows the requestor the specific location of any redacted material in the record.* For example,

if redacting a social security number or similar type of small-scale redaction, custodians should:

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 requestor." (Emphasis added.) *Id.* at page 14.

In this complaint, the original minutes requested by the Complainant contained substantive material following each issue heading. It appears that the Custodian "electronically" redacted the meeting minutes by deleting this material and inserting the phrase "[t]his matter remains confidential due to [ACD] materials not subject to public disclosure," as opposed to redacting the information using a "visually obvious method that shows the specific location of any redacted material..." This method does not show the requestor the specific location of the redacted material or the volume of material redacted. Although the Custodian eventually did release the requested records, the specific location of the redactions made was not visually obvious.

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 GRC<sup>13</sup> in which the GRC dismissed the complaint by accepting the Custodian's legal conclusion for the denial of access without further review. The court stated that:

"OPRA contemplates the GRC's meaningful review of the basis for an agency's decision to withhold government records...When the GRC decides to proceed with an investigation and hearing, the custodian may present evidence and argument, but the GRC is not required to accept as adequate whatever the agency offers."

The court also stated that:

"[t]he statute also contemplates the GRC's *in camera* review of the records that an agency asserts are protected when such review is necessary to a determination of the validity of a claimed exemption. Although OPRA subjects the GRC to the provisions of the 'Open Public Meetings Act,' N.J.S.A. 10:4-6 to -21, it also provides that the GRC 'may go into closed session during that portion of any proceeding during which the contents of a contested record would be disclosed.' N.J.S.A. 47:1A-7f. This provision would be unnecessary if the Legislature did not intend to permit *in camera* review."

Further, the court stated that:

"[w]e hold only that the GRC has and should exercise its discretion to conduct *in camera* review when necessary to resolution of the appeal...There is no reason for concern about unauthorized disclosure of

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<sup>13</sup> Paff v. NJ Department of Labor, Board of Review, GRC Complaint No. 2003-128 (October 2005).  
Jesse Wolosky v. Andover Regional School District (Sussex), 2009-94 – Findings and Recommendations of the Executive Director

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 seven (7) records responsive to determine the validity of the Custodian’s assertion that the record constitutes ACD material which is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1.:

- September 16, 2008 executive session meeting minutes
- October 7, 2008 executive session meeting minutes
- October 21, 2008 executive session meeting minutes
- November 4, 2008 executive session meeting minutes
- November 18, 2008 executive session meeting minutes
- December 2, 2008 executive session meeting minutes
- December 16, 2008 executive session meeting minutes

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

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

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

The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian’s compliance with the Council’s Interim Order.

**Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. The Custodian’s response to the Complainant’s OPRA request was insufficient because she failed to specifically state whether the requested executive session meeting minutes were approved by the governing body at the time of the Complainant’s request pursuant to N.J.S.A. 47:1A-5.g. and Paff v. Township of Berkeley Heights (Union), GRC Complaint No. 2007-271 (November 2008).
2. Because the requested executive session meeting minutes were approved by the Andover Regional School District Board of Education at the time of the Complainant’s OPRA request and did not constitute advisory, consultative or

deliberative material pursuant to N.J.S.A. 47:1A-1.1., the Custodian has unlawfully denied access to the requested executive session meeting minutes. Further, the Custodian has failed to bear her burden of proving a lawful denial of access to the requested executive session meeting minutes pursuant to N.J.S.A. 47:1A-6.

3. Pursuant to Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005), the GRC must conduct an *in camera* review of the seven (7) records responsive to determine the validity of the Custodian's assertion that the record constitutes inter-agency or intra-agency advisory, consultative or deliberative material which is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1.:
  - September 16, 2008 executive session meeting minutes.
  - October 7, 2008 executive session meeting minutes.
  - October 21, 2008 executive session meeting minutes.
  - November 4, 2008 executive session meeting minutes.
  - November 18, 2008 executive session meeting minutes.
  - December 2, 2008 executive session meeting minutes.
  - December 16, 2008 executive session meeting minutes.
4. **The Custodian must deliver<sup>14</sup> to the Council in a sealed envelope nine (9) copies of the requested unredacted document (see No. 3 above), a document or redaction index<sup>15</sup>, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4<sup>16</sup>, that the document provided is the document requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**
5. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
6. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Prepared By: Frank F. Caruso  
Case Manager

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<sup>14</sup> The *in camera* documents may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as they arrive at the GRC office by the deadline.

<sup>15</sup> The document or redaction index should identify the document and/or each redaction asserted and the lawful basis for the denial.

<sup>16</sup> "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."

Approved By: Catherine Starghill, Esq.  
Executive Director

April 21, 2010