



State of New Jersey  
GOVERNMENT RECORDS COUNCIL

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

CHRIS CHRISTIE  
Governor

KIM GUADAGNO  
Lt. Governor

RICHARD E. CONSTABLE, III  
Acting Commissioner

FINAL DECISION

February 28, 2012 Government Records Council Meeting

James Sage  
Complainant

Complaint No. 2010-108

v.

Freehold Regional High School District (Monmouth)  
Custodian of Record

At the February 28, 2012 public meeting, the Government Records Council (“Council”) considered the February 21, 2012 *Reconsideration* Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that because the Custodian’s Counsel has established in his request for reconsideration of the Council’s November 29, 2011 Final Decision that GRC did not consider the significance of probative, competent evidence, said request for reconsideration is granted Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996); D’Atria v. D’Atria, 242 N.J. Super. 392 (Ch. Div. 1990); In The Matter Of The Petition Of Comcast Cablevision Of South Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Television System In The City Of Atlantic City, County Of Atlantic, State Of New Jersey, 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003). Therefore, the Council amends paragraph No. 1 of its November 29, 2011 Final Decision to reflect that the Custodian did in fact comply with the Council’s February 24, 2011 Interim Order as follows:

“Although the GRC received the Custodian’s compliance with the Council’s February 24, 2011 Interim Order on March 9, 2011, the sixth (6<sup>th</sup>) business day following receipt of the Interim Order, the evidence of record indicates that same was received in the New Jersey Department of Community Affairs mailroom on March 8, 2011. Therefore, the Custodian timely complied with the Council’s February 24, 2011 Interim Order.”

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 28<sup>th</sup> Day of February, 2012

Robin Berg Tabakin, Esq., Chair  
Government Records Council

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

Denise Parkinson Vetti, Esq., Secretary  
Government Records Council

**Decision Distribution Date: March 5, 2012**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

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

**James Sage<sup>1</sup>  
Complainant**

**GRC Complaint No. 2010-108**

v.

**Freehold Regional High School District  
(Monmouth)<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:** A copy of the investigation conducted by the Freehold Regional High School District into allegations of inappropriate behavior by former teacher Mr. Daniel Flynn, including copies of notes, statements, conclusions, and/or recommendations, made by witnesses, Mr. Flynn, complainants, and the law firm representing the district.

**Request Made:** April 24, 2010

**Response Made:** May 4, 2010

**Custodian:** Sean Boyce

**GRC Complaint Filed:** May 25, 2010

**Background**

**November 29, 2011**

Government Records Council's ("Council") Final Decision. At its November 29, 2011 public meeting, the Council considered the November 22, 2011 *In Camera* Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. Because the Custodian provided the GRC with a legal certification, the unredacted record requested for the *in camera* inspection and a document index on March 9, 2011, the sixth (6<sup>th</sup>) business day following receipt of the Interim Order, the Custodian did not timely comply with the Council's February 24, 2011 Interim Order.
2. The GRC's *in camera* examination of the handwritten student note dated April 20, 2009, responsive to the Complainant's OPRA request revealed that

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

<sup>2</sup> Represented by Lawrence S. Schwartz, Esq., of Schwartz, Simon, Edelstein, Celso, & Zitomer, LLC (Whippany, NJ).

the handwritten note contained information about an alleged incident between another student and a district employee. In addition, the Custodian has certified that this note was used in furtherance of the District's investigation of this alleged inappropriate relationship. Furthermore, the Custodian has certified that this handwritten note was used in preparation of a Final Incident Report. Therefore, the handwritten student note is exempt from disclosure under OPRA as it constitutes advisory, consultative and deliberative material pursuant to N.J.S.A. 47:1A-1.1.

3. The Custodian did not timely comply with the Council's Order because he failed to provide the *in camera* record, legal certification and document index to the GRC within the required five (5) business days from receipt of the Council's Order. However, the Custodian lawfully denied the Complainant access to the handwritten student note responsive to the Complainant's request because it constitutes advisory, consultative and deliberative material because said note was used in preparation of the school district's Final Incident Report and thus is exempt from disclosure under OPRA pursuant to N.J.S.A. 47:1A-1.1. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

### **December 5, 2011**

Council's Final Decision distributed to the parties.

### **December 8, 2011**

Custodian Counsel's request for reconsideration attaching tracking receipt No. 15189201 from the New Jersey Lawyer's Service ("NJLS"). Counsel requests that the GRC reconsider its Final Decision. Counsel attaches a three (3) page brief in his support for reconsideration.<sup>3</sup>

Counsel states that the Council found that "the Custodian provided the GRC with a legal certification, unredacted record requested for the *in camera* inspection and a redaction index on March 9, 2011, the sixth (6<sup>th</sup>) business day following receipt of the Interim Order, the Custodian did not fully comply with the Council's February 24, 2011 Interim Order."<sup>4</sup> Counsel states that the attached tracking receipt indicates that NJLS picked up the Custodian's response to the Council's February 24, 2011 Interim Order from Counsel's law office on March 7, 2011 at 8:26 p.m. and delivered it to the GRC on March 8, 2011 at 12:26 p.m.<sup>5</sup> Counsel also states that Mr. John Croot, Esq., ("Mr. Croot"), received a telephone call on March 15, 2011 from the GRC stating that the GRC had not yet received the Custodian's response to the February 24, 2011 Interim Order.<sup>6</sup>

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<sup>3</sup> Custodian's Counsel does not include the GRC's request for reconsideration form.

<sup>4</sup> The evidence of record indicates that the Custodian received the Council's February 24, 2011 Interim Order on March 1, 2011.

<sup>5</sup> The tracking receipt states that the package was "dropped inside m/room."

<sup>6</sup> Mr. Croot is another attorney with Schwartz, Simon, Edelstein, Celso, & Zitomer, LLC.

Counsel further states that Mr. Croot received a message from the GRC on March 16, 2011 stating that the Custodian's response to the Council's Interim Order was located.

Counsel argues that the Custodian's response to the Interim Order was timely forwarded to the GRC and received the day it was due. Counsel requests that the Final Decision and the Findings and Recommendations of the Executive Director in this matter be amended to remove any reference to the alleged failure by the Custodian to timely comply with the Council's February 24, 2011 Interim Order.

#### **December 14, 2011**

E-mail from Custodian's Counsel to the GRC. Counsel confirms his recent telephone conversation with the GRC in which the GRC advised Counsel that the Council will be treating Counsel's letter dated December 8, 2011 as a request for reconsideration of the Final Decision and Findings and Recommendations of the Executive Director in the above-referenced matter. Counsel also confirms that it was not necessary to file the GRC's request for reconsideration form.

#### **Analysis**

#### **Whether the Custodian has met the required standard for reconsideration of the Council's November 29, 2011 Final Decision?**

Pursuant to *N.J.A.C. 5:105-2.10*, parties may file a request for a reconsideration of any decision rendered by the Council within ten (10) business days following receipt of a Council decision. Requests must be in writing, delivered to the Council and served on all parties. Parties must file any objection to the request for reconsideration within ten (10) business days following receipt of the request. The Council will provide all parties with written notification of its determination regarding the request for reconsideration. *N.J.A.C. 5:105-2.10(a) – (e)*.

In the matter before the Council, Custodian's Counsel filed the request for reconsideration of the Council's Final Decision dated November 29, 2011 on December 8, 2011, three (3) days from the issuance of the Council's Final Decision.<sup>7</sup>

Applicable case law holds that:

“[a] party should not seek reconsideration merely based upon dissatisfaction with a decision.” *D'Atria v. D'Atria*, 242 *N.J. Super.* 392, 401 (Ch. Div. 1990). Rather, reconsideration is reserved for those cases where (1) the decision is based upon a "palpably incorrect or irrational basis;" or (2) it is obvious that the finder of fact did not consider, or failed to appreciate, the significance of probative, competent evidence. *E.g., Cummings v. Bahr*, 295 *N.J. Super.* 374, 384 (App. Div. 1996). The moving party must show that the court acted in an arbitrary, capricious or unreasonable manner. *D'Atria, supra*, 242 *N.J. Super.* at 401. ‘Although it is an overstatement to say that a decision is not arbitrary, capricious, or

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<sup>7</sup> The Council's November 29, 2011 Final Decision was distributed to the parties on December 5, 2011. *James Sage v. Freehold Regional High School District (Monmouth)*, 2010-108 – Supplemental Findings and Recommendations of the Executive Director

unreasonable whenever a court can review the reasons stated for the decision without a loud guffaw or involuntary gasp, it is not much of an overstatement.’ *Ibid.*” In The Matter Of The Petition Of Comcast Cablevision Of South Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Television System In The City Of Atlantic City, County Of Atlantic, State Of New Jersey, 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

In support of his request for reconsideration, Custodian’s Counsel submitted a three (3) page summary of evidence and a tracking receipt from NJLS. Upon review of this evidence it appears that NJLS delivered the Custodian’s response to the Council’s February 24, 2011 Interim Order on March 8, 2011. The evidence of record indicates that Custodian’s response was hand-delivered to the Department of Community Affairs (“DCA”) mailroom on March 8, 2011. However, the evidence of record also indicates that the GRC did not receive the Custodian’s response until March 9, 2011.<sup>8</sup>

As the moving party, Counsel was required to establish either of the necessary criteria set forth above; namely 1) that the Council’s decision is based upon a "palpably incorrect or irrational basis" or 2) it is obvious that the Council did not consider the significance of probative, competent evidence. *See Cummings, supra*. Counsel has met his burden of proving that the GRC inadvertently failed to consider the significance of probative, competent evidence by providing sufficient evidence that the Custodian complied with the Council’s February 24, 2011 Interim Order in a timely manner. *See D’Atria, supra*.

Therefore, because the Custodian’s Counsel has established in his request for reconsideration of the Council’s November 29, 2011 Final Decision that GRC did not consider the significance of probative, competent evidence, said request for reconsideration is granted *Cummings, supra*; *D’Atria, supra*; In The Matter Of The Petition Of Comcast Cablevision Of South Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Television System In The City Of Atlantic City, County Of Atlantic, State Of New Jersey, 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003). Therefore, the Council amends paragraph No. 1 of its November 29, 2011 Final Decision to reflect that the Custodian did in fact comply with the Council’s February 24, 2011 Interim Order as follows:

“Although the GRC received the Custodian’s compliance with the Council’s February 24, 2011 Interim Order on March 9, 2011, the sixth (6<sup>th</sup>) business day following receipt of the Interim Order, the evidence of record indicates that same was received in the New Jersey Department of Community Affairs mailroom on March 8, 2011. Therefore, the Custodian timely complied with the Council’s February 24, 2011 Interim Order.”

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<sup>8</sup> The evidence of record indicates that the DCA mailroom delivered the Custodian’s response to the Council’s February 24, 2011 Interim Order to the GRC on March 9, 2011; the GRC date stamped the Custodian’s submission as received on March 9, 2011.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that because the Custodian's Counsel has established in his request for reconsideration of the Council's November 29, 2011 Final Decision that GRC did not consider the significance of probative, competent evidence, said request for reconsideration is granted Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996); D'Atria v. D'Atria, 242 N.J. Super. 392 (Ch. Div. 1990); In The Matter Of The Petition Of Comcast Cablevision Of South Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Television System In The City Of Atlantic City, County Of Atlantic, State Of New Jersey, 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003). Therefore, the Council amends paragraph No. 1 of its November 29, 2011 Final Decision to reflect that the Custodian did in fact comply with the Council's February 24, 2011 Interim Order as follows:

“Although the GRC received the Custodian's compliance with the Council's February 24, 2011 Interim Order on March 9, 2011, the sixth (6<sup>th</sup>) business day following receipt of the Interim Order, the evidence of record indicates that same was received in the New Jersey Department of Community Affairs mailroom on March 8, 2011. Therefore, the Custodian timely complied with the Council's February 24, 2011 Interim Order.”

Prepared By: Harlynn A. Lack, Esq.  
Case Manager

Approved By: Catherine Starghill, Esq.  
Executive Director

February 21, 2012



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

CHRIS CHRISTIE  
Governor

KIM GUADAGNO  
Lt. Governor

LORI GRIFA  
Commissioner

**FINAL DECISION**

**November 29, 2011 Government Records Council Meeting**

James Sage  
Complainant

Complaint No. 2010-108

v.

Freehold Regional High School District (Monmouth)  
Custodian of Record

At the November 29, 2011 public meeting, the Government Records Council (“Council”) considered the November 22, 2011 *In Camera* Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. Because the Custodian provided the GRC with a legal certification, the unredacted record requested for the *in camera* inspection and a document index on March 9, 2011, the sixth (6<sup>th</sup>) business day following receipt of the Interim Order, the Custodian did not timely comply with the Council’s February 24, 2011 Interim Order.
2. The GRC’s *in camera* examination of the handwritten student note dated April 20, 2009, responsive to the Complainant’s OPRA request revealed that the handwritten note contained information about an alleged incident between another student and a district employee. In addition, the Custodian has certified that this note was used in furtherance of the District’s investigation of this alleged inappropriate relationship. Furthermore, the Custodian has certified that this handwritten note was used in preparation of a Final Incident Report. Therefore, the handwritten student note is exempt from disclosure under OPRA as it constitutes advisory, consultative and deliberative material pursuant to N.J.S.A. 47:1A-1.1.
3. The Custodian did not timely comply with the Council’s Order because he failed to provide the *in camera* record, legal certification and document index to the GRC within the required five (5) business days from receipt of the Council’s Order. However, the Custodian lawfully denied the Complainant access to the handwritten student note responsive to the Complainant’s request because it constitutes advisory, consultative and deliberative material because said note was used in preparation of the school district’s Final Incident Report and thus is exempt from disclosure under OPRA pursuant to N.J.S.A. 47:1A-1.1. Additionally, the evidence of record does not indicate that the Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.





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

Final Decision Rendered by the  
Government Records Council  
On The 29<sup>th</sup> Day of November 29, 2011

Robin Berg Tabakin, Chair  
Government Records Council

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

Denise Parkinson Vetti, Secretary  
Government Records Council

**Decision Distribution Date: December 5, 2011**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

***In Camera* Findings and Recommendations of the Executive Director  
November 29, 2011 Council Meeting**

**James Sage<sup>1</sup>  
Complainant**

**GRC Complaint No. 2010-108**

**v.**

**Freehold Regional High School District (Monmouth)<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:** A copy of the investigation conducted by the Freehold Regional High School District into allegations of inappropriate behavior by former teacher Mr. Daniel Flynn, including copies of notes, statements, conclusions, and/or recommendations, made by witnesses, Mr. Flynn, complainants, and the law firm representing the district.

**Request Made:** April 24, 2010

**Response Made:** May 4, 2010

**Custodian:** Sean Boyce

**GRC Complaint Filed:** May 25, 2010<sup>3</sup>

**Records Submitted for *In Camera* Examination:** Handwritten student note from an interview dated April 20, 2009.

**Background**

**February 24, 2011**

Government Records Council's Interim Order. At the February 24, 2011 public meeting, the Government Records Council ("Council") considered the February 17, 2011 Executive Director's Findings and Recommendations and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council therefore found that:

1. 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 handwritten student notes to determine the validity of the Custodian's assertion that the record contains advisory, consultative or deliberative material which is exempt from disclosure under OPRA pursuant to N.J.S.A. 47:1A-1.1.

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

<sup>2</sup> Represented by Lawrence S. Schwartz, Esq., of Schwartz, Simon, Edelstein, Celso, & Zitomer, LLC (Morristown, NJ)

<sup>3</sup> The GRC received the Denial of Access Complaint on said date.

2. **The Custodian must deliver<sup>4</sup> to the Council in a sealed envelope nine (9) copies of the requested unredacted document (see #1 above), a document or redaction index<sup>5</sup>, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4<sup>6</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.**
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.

### **February 28, 2011**

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

### **March 9, 2011**

Certification of the Custodian in response to the Council's Interim Order attaching a handwritten student note from an interview dated April 20, 2009.

The Custodian certifies that this record responsive consists of notes of an interview of a student concerning that student's knowledge of alleged misconduct by a teaching staff member with a student. The Custodian also certifies that these notes were signed by the student and were later used in the preparation of a Discipline Incident Report concerning the teaching staff member.

The Custodian argues that the handwritten student note is exempt from disclosure as advisory, consultative and deliberative material pursuant to N.J.S.A. 47:1A-1.1, O'Shea v. West Milford Board of Education, 391 N.J. Super. 534 (App. Div. 2007). The Custodian also argues that the note relates to a confidential student matter, in that the subject of the notes was alleged to have been victimized by a staff member, and the notes contain information related to the alleged victimization. The Custodian certifies that the statements contained in such notes were made by a fellow student. The Custodian also argues that the subject note is a confidential student record and exempt from disclosure pursuant to Bava v. Bergen County School District, GRC Complaint No. 2005-125 and N.J.A.C. 6A:32-7.1. The Custodian further argues that the handwritten notes relate to a confidential personnel matter and is exempt from disclosure under OPRA pursuant to N.J.S.A. 47:1A-10.

The Custodian certifies that he has provided the GRC with this certification, a document index, and nine (9) copies of the unredacted records responsive to the Complainant's OPRA request.

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<sup>4</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>5</sup> The document or redaction index should identify the document and/or each redaction asserted and the lawful basis for the denial.

<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."

## Analysis

### **Whether the Custodian complied with the Council's February 24, 2011 Interim Order?**

At its February 24, 2011 public meeting, the Council determined that because the Custodian has asserted that the requested record was lawfully denied because the record responsive contains advisory, consultative or deliberative ("ACD") material, the Council must determine whether the legal conclusions asserted by the Custodian are properly applied to the record at issue pursuant to Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005) via an *in camera* review of the requested record to determine the validity of the Custodian's assertion that access to the requested record was properly denied.

The Council therefore ordered the Custodian to deliver to the Council in a sealed envelope nine (9) copies of the requested unredacted record, 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 record provided is the record 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 March 8, 2011.

Therefore, because the Custodian provided the GRC with a legal certification, the unredacted record requested for the *in camera* inspection and a redaction index on March 9, 2011, the sixth (6<sup>th</sup>) business day following receipt of the Interim Order, the Custodian did not timely comply with the Council's February 24, 2011 Interim Order.

### **Whether the handwritten student note dated April 20, 2009 responsive to the Complainant's OPRA request is exempt from disclosure under OPRA as advisory, consultative and/or deliberative material?**

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, 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.

In the matter before the Council, the Custodian asserted that he lawfully denied the Complainant access to the requested record because the handwritten student note was later used in preparation of a Discipline Incident Report concerning the teaching staff member. The Custodian also asserted that the requested memorandum contains ACD material which is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1.

The Custodian certified that the handwritten note was prepared by a student detailing an incident between another student and an employee. The Custodian also certified that these notes were submitted to the school's Administration in furtherance of the investigation of the incident and were a record of a student's observations as they were contained in that student's memory. The Custodian further certified that this handwritten note was used to assist the Administration in preparing an incident report. Conversely, the Complainant asserted that the Custodian's denial of access was unlawful because the handwritten note contains factual information obtained by the School District during the course of a non-criminal investigation and thus the note should not be considered exempt from disclosure under OPRA as ACD material.

The GRC conducted an *in camera* examination on the submitted record pursuant to Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005). The results of this examination are set forth in the following table:

<b>Record or Redaction Number</b>	<b>Record Name/Date</b>	<b>Description of Record or Redaction</b>	<b>Custodian's Explanation/ Citation for Non-disclosure or Redactions</b>	<b>Findings of the <i>In Camera</i> Examination</b>
1	Handwritten student note dated April 20, 2009	Access to this record was denied in its entirety.	The Custodian argues the handwritten student note is exempt from disclosure as advisory, consultative or deliberative materials pursuant to <u>N.J.S.A. 47:1A-1.1</u> . The Custodian also argues that the handwritten student note is a confidential student record pursuant to	The record is exempt from disclosure in its entirety because the handwritten student note contains information of an alleged incident between a student and employee of the school district and was used in preparation of the school district's Final Incident Report. Therefore, such information constitutes ACD material and is exempt from disclosure under OPRA pursuant to <u>N.J.S.A. 47:1A-1.1</u> .

			<p><u>Bava v. Bergen County School District</u>, GRC Complaint No. 2005-125 and <u>N.J.A.C. 6A:32-7.1</u>.          Lastly, the Custodian argues that the record is exempt from disclosure because it relates to a confidential personnel matter pursuant to <u>N.J.S.A. 47:1A-10</u>.</p>	
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**Whether the Custodian’s actions rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances?**

OPRA states that:

“[a] public official, officer, employee or custodian who knowingly or willfully violates [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, shall be subject to a civil penalty ...” N.J.S.A. 47:1A-11.a.

OPRA allows the Council to determine a knowing and willful violation of the law and unreasonable denial of access under the totality of the circumstances. Specifically OPRA states:

“... If the council determines, by a majority vote of its members, that a custodian has knowingly and willfully violated [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, the council may impose the penalties provided for in [OPRA]...” N.J.S.A. 47:1A-7.e.

Certain legal standards must be considered when making the determination of whether the Custodian’s actions rise to the level of a “knowing and willful” violation of OPRA. The following statements must be true for a determination that the Custodian “knowingly and willfully” violated OPRA: the Custodian’s actions must have been much more than negligent conduct (Alston v. City of Camden, 168 N.J. 170, 185 (2001); the Custodian must have had some knowledge that his actions were wrongful (Fielder v. Stonack, 141 N.J. 101, 124 (1995)); the Custodian’s actions must have had a positive element



of conscious wrongdoing (Berg v. Reaction Motors Div., 37 N.J. 396, 414 (1962)); the Custodian's actions must have been forbidden with actual, not imputed, knowledge that the actions were forbidden (Berg); the Custodian's actions must have been intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional (ECES v. Salmon, 295 N.J.Super. 86, 107 (App. Div. 1996).

The Custodian did not timely comply with the Council's Order because he failed to provide the *in camera* record, legal certification and document index to the GRC within the required five (5) business days from receipt of the Council's Order. However, the Custodian lawfully denied the Complainant access to the handwritten student note responsive to the Complainant's request because it constitutes ACD material because said note was used in preparation of the school district's Final Incident Report and thus is exempt from disclosure under OPRA pursuant to N.J.S.A. 47:1A-1.1. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. Because the Custodian provided the GRC with a legal certification, the unredacted record requested for the *in camera* inspection and a document index on March 9, 2011, the sixth (6<sup>th</sup>) business day following receipt of the Interim Order, the Custodian did not timely comply with the Council's February 24, 2011 Interim Order.
2. The GRC's *in camera* examination of the handwritten student note dated April 20, 2009, responsive to the Complainant's OPRA request revealed that the handwritten note contained information about an alleged incident between another student and a district employee. In addition, the Custodian has certified that this note was used in furtherance of the District's investigation of this alleged inappropriate relationship. Furthermore, the Custodian has certified that this handwritten note was used in preparation of a Final Incident Report. Therefore, the handwritten student note is exempt from disclosure under OPRA as it constitutes advisory, consultative and deliberative material pursuant to N.J.S.A. 47:1A-1.1.
3. The Custodian did not timely comply with the Council's Order because he failed to provide the *in camera* record, legal certification and document index to the GRC within the required five (5) business days from receipt of the Council's Order. However, the Custodian lawfully denied the Complainant access to the handwritten student note responsive to the Complainant's request because it constitutes advisory, consultative and deliberative material because said note was used in preparation of the school district's Final Incident Report and thus is exempt from disclosure under OPRA pursuant to N.J.S.A. 47:1A-1.1.

Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Prepared By: Harlynn A. Lack, Esq.  
Case Manager

Approved By: Catherine Starghill, Esq.  
Executive Director

November 22, 2011



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

CHRIS CHRISTIE  
Governor

KIM GUADAGNO  
Lt. Governor

LORI GRIFA  
Commissioner

INTERIM ORDER

February 24, 2011 Government Records Council Meeting

James Sage  
Complainant

Complaint No. 2010-108

v.

Freehold Regional High School District (Monmouth)  
Custodian of Record

At the February 24, 2011 public meeting, the Government Records Council ("Council") considered the February 15, 2011 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. 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 handwritten student notes to determine the validity of the Custodian's assertion that the record contains advisory, consultative or deliberative material which is exempt from disclosure under OPRA pursuant to N.J.S.A. 47:1A-1.1.
2. **The Custodian must deliver<sup>1</sup> to the Council in a sealed envelope nine (9) copies of the requested unredacted document (see #1 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.**
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.

<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."

Interim Order Rendered by the  
Government Records Council  
On The 24<sup>th</sup> Day of February, 2011

Robin Berg Tabakin, Chair  
Government Records Council

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

Charles A. Richman, Secretary  
Government Records Council

**Decision Distribution Date: February 28, 2011**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
February 24, 2011 Council Meeting**

**James Sage<sup>1</sup>  
Complainant**

**GRC Complaint No. 2010-108**

v.

**Freehold Regional High School District (Monmouth)<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:** A copy of the investigation conducted by the Freehold Regional High School District into allegations of inappropriate behavior by former teacher Mr. Daniel Flynn, including copies of notes, statements, conclusions, and/or recommendations, made by witnesses, Mr. Flynn, complainants, and the law firm representing the district.

**Request Made:** April 24, 2010

**Response Made:** May 4, 2010

**Custodian:** Sean Boyce

**GRC Complaint Filed:** May 25, 2010<sup>3</sup>

**Background**

**April 24, 2010**

Complainant's Open Public Records Act ("OPRA") request. The Complainant requests the records relevant to this complaint listed above in an e-mail referencing OPRA.

**May 4, 2010**

Custodian's response to the OPRA request. The Custodian responds in writing to the Complainant's OPRA request on the seventh (7<sup>th</sup>) business day following receipt of such request. The Custodian states that there are three (3) records responsive to the Complainant's request. These records include handwritten notes from student interviews.<sup>4</sup>

The Custodian states that access to the handwritten notes is denied because notes taken during student interviews are not considered to be government records and are considered advisory, consultative, and deliberative ("ACD") material pursuant to O'Shea

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

<sup>2</sup> Represented by Lawrence S. Schwartz, Esq., of Schwartz, Simon, Edelstein, Celso, & Zitomer, LLC (Morristown, NJ).

<sup>3</sup> The GRC received the Denial of Access Complaint on said date.

<sup>4</sup> The Custodian identified additional records responsive to the Complainant's OPRA request. However, such records are not relevant to the adjudication of this complaint.

v. West Milford Board of Education, 391 N.J. Super. 534 (App. Div. 2007). Further, the Custodian asserts that the notes are also exempt from disclosure because the notes relate to a confidential student matter; such notes are student records which are exempt from disclosure except to specifically authorized people pursuant to Bava v. Bergen County School District, GRC Complaint No. 2003-84 (January 2004).

### **May 5, 2010**

Letter from the Complainant to the GRC. The Complainant states that he was unlawfully denied access to the requested handwritten student notes. The Complainant states that the OPRA request sought factual information regarding the school district's investigation into allegations of inappropriate behavior by a former teacher. The Complainant states that the cases cited by the Custodian in support of the denial of access to the requested notes are not applicable to the instant matter. The Complainant states that O'Shea v. West Milford Board of Education, 391 N.J. Super. 534 (App Div. 2007) relates to notes taken at a public meeting and used as a memory aid. The Complainant asserts that the O'Shea case is therefore not applicable to the instant request. The Complainant states that he seeks factual information obtained by the Freehold Regional High School District employees and/or students during the course of a non-criminal investigation, which were subsequently utilized to assist a criminal investigation conducted by the Monmouth County Prosecutor's Office.

The Complainant also asserts that Bava v. Bergen County School District, GRC Complaint No. 2003-84 (January 2004), is similarly inapplicable to this matter because N.J.A.C. 6A:3-6.2(c) states in relevant part that "[p]upil records shall contain only such information as is relevant to the education of the pupil and is objectively based on the personal observations or knowledge of the certified school personnel who originate the records." The Complainant asserts that pursuant to this definition, factual investigative reports which are not educational in nature and which are initiated by school staff prompting students to report factual allegations of inappropriate conduct by staff, are indeed government records and are subject to inspection and review by the public. The Complainant asserts that incidents of this nature are not education-oriented and are not subject to personal observations and/or knowledge of school personnel who originate the records.

### **May 25, 2010**

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

- Complainant's OPRA request dated April 24, 2010
- Letter from the Custodian to the Complainant dated May 4, 2010
- Letter from the Complainant to the GRC dated May 5, 2010

The Complainant states that access to the requested handwritten notes was unlawfully denied. The Complainant argues that these records are not ACD material. The Complainant also argues that the responsive notes should not be considered student records.

**The Complainant does not agree to mediate this complaint.**

**May 26, 2010**

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

**June 4, 2010**

Custodian’s SOI with the following attachments:

- Complainant’s OPRA request dated April 24, 2010
- Letter from the Custodian to the Complainant dated May 4, 2010

The Custodian certifies that he conducted a comprehensive search of all District files including the personnel file of the teacher who is the subject of the investigation in question. Additionally, the Custodian certifies that he searched through various student files to find any responsive records. Furthermore, the Custodian certifies that he contacted the attorney for the Board of Education and requested that the attorney search his files for any records responsive. Lastly, the Custodian certifies that confidential student records must be retained for seven (7) years after graduation pursuant to New Jersey Division of Archives and Records Management (“DARM”) Schedule M700106-001.

The Custodian certifies that the Complainant submitted an OPRA request on April 24, 2010 to the Board of Education requesting “[a] copy of the investigation conducted by the Freehold Regional High School District into allegations of inappropriate behavior by former teacher Daniel Flynn, including: any copies of notes, statements, conclusions, and/or recommendations, made by witnesses, the subject of the investigation – Mr. Flynn, complainants, and the legal firm representing this district.”

The Custodian certifies that he responded to the Complainant’s request on May 4, 2010 stating that after a search of the District’s files, handwritten notes from a student interview were found responsive to the Complainant’s request. The Custodian also certifies that no records were produced in response to the Complainant’s request. The Custodian certifies that the handwritten notes were not disclosed due to the fact that it related to a confidential student matter as it was authored by a student and contained information related to the alleged victimization of another student by a District employee. The Custodian also argues that the handwritten notes were exempt from disclosure pursuant to the advisory, consultative and deliberative (“ACD”) exemption contained in OPRA.

The Custodian certifies that the handwritten statement authored by “J.P.” a student witness, concerned that student’s knowledge of an alleged incident. The Custodian also certifies that those notes were later used to prepare the Discipline Incident Report. The Custodian further certifies that the teacher mentioned in the handwritten notes was alleged to have had a sexual relationship with a student. The Custodian also certifies that the allegations were of such a nature that the Monmouth County Prosecutor’s Office conducted its own investigation and charged the teacher with various criminal offenses including endangering the welfare of a minor. The Custodian certifies that the matter was ultimately resolved when the teacher pleaded guilty to the charges and was placed on a pre-trial intervention program and was ordered to forfeit his teaching

position. The Custodian argues that the record at issue is directly related to the allegations against the staff member and how his conduct relates to a District student.

The Custodian certifies that a student wrote down her recollection of a series of events related to an alleged inappropriate relationship between a District teacher and another student. The Custodian further certifies that the information contained therein was clearly related to an individual student and maintained within the school district, as the student was actually the subject of the record.

The Custodian certifies that the handwritten notes were prepared by another student attesting to that student's opinions and observations regarding the alleged relationship and the conduct of the student who was the object of the teacher's inappropriate conduct. The Custodian argues that the identities of the students have never been made public in order to protect their privacy and other legal rights. The Custodian argues that the handwritten notes were written by a student and contain information relating to a teacher's alleged inappropriate relationship with a student and contains certain information related both to that student and the student who authored the record and thus, these records are student records pursuant to N.J.A.C. 6A:32-3.2 (definition of a student record) and are therefore exempt from disclosure under OPRA.<sup>5</sup> The Custodian also argues that student records and records related to confidential student matters are not subject to disclosure under OPRA.

The Custodian argues that pursuant to N.J.A.C. 6A:32-7.1 student records may only be released to authorized persons, and a person requesting records pursuant to OPRA is not defined as an "authorized person" such that confidential records may be released to them. Furthermore, the Custodian asserts that the GRC has consistently held that student records may not be disclosed pursuant to an OPRA request, Bava v. Bergen County School District, GRC Complaint No. 2003-84 (2004) and Watson v. Washington Twp. School District, GRC Complaint No. 2009-29 (2009). The Custodian contends that the GRC has held that the restrictions on access to student records contained in Title 6A must prevail over any request made pursuant to OPRA. The Custodian argues that the Complainant does not meet the requirements for access of student records, and therefore he is not entitled to obtain the record at issue. The Custodian also argues that without any legal support, the Complainant asserts that the record at issue is not a student record because it contains factual information related to the investigation. The Custodian asserts that the requested record is a student record because it contains information related to individual students.

Additionally, the Custodian contends that the handwritten notes are student records applicable not only to the student who is referred to therein, but also to the student who wrote the note. In addition, the Custodian asserts that because these handwritten notes are student records, these records may only be released to authorized persons. The Custodian also argues that the requested record does not contain factual

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<sup>5</sup> N.J.A.C. 6A:32-3.2 defines a student record as, "information related to an individual student gathered within or outside the school district and is maintained within the school district, regardless of the physical form in which it is maintained."



information but is an individual student's recollections of events that might have occurred between a student and a staff member.

Furthermore, the Custodian also asserts that if the handwritten notes are not considered student records, such records should be exempt from disclosure because the notes are ACD material. The Custodian cites to O'Shea v. West Milford Board of Education, 391 N.J. Super. 534 (App. Div. 2007) where the Court upheld the GRC's decision that handwritten notes taken during a board meeting and later used to prepare the formal minutes were exempt because they were considered ACD. The Custodian argues that O'Shea, *supra*, is similar to the instant complaint. Furthermore, the Custodian asserts the handwritten note was prepared by a student detailing an incident between another student and an employee. The Custodian certifies that these notes were submitted to the school's Administration in furtherance of the investigation of the incident. Additionally, the Custodian certifies that the handwritten notes were used to assist the Administration in preparing an incident report.

Lastly, the Custodian contends that the handwritten notes should be exempt from disclosure under OPRA as a confidential personnel matter. The Custodian argues that because the handwritten notes were related to an investigation of a staff member's conduct, the notes relate to the employee's conduct while performing his job duties and should therefore be considered a personnel record.

### Analysis

#### **Whether the Custodian unlawfully denied access to the requested record?**

OPRA provides that:

"...government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, *with certain exceptions...*" (Emphasis added.) N.J.S.A. 47:1A-1.

Additionally, OPRA defines a government record as:

"... any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof, that has been *made, maintained or kept on file ... or that has been received* in the course of his or its official business ... 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.

OPRA places the onus on the Custodian to prove that a denial of access is lawful. Specifically, OPRA states:

"...[t]he public agency shall have the burden of proving that the denial of access is authorized by law..." N.J.S.A. 47:1A-6.

OPRA provides that government records made, maintained, kept on file, or received by a public agency in the course of its official business are subject to public access unless otherwise exempt. N.J.S.A. 47:1A-1.1. A custodian must release all records responsive to an OPRA request “with certain exceptions.” N.J.S.A. 47:1A-1. Additionally, OPRA places the burden on a custodian to prove that a denial of access to records is lawful pursuant to N.J.S.A. 47:1A-6.

In the instant complaint, the Custodian responded to the Complainant’s OPRA request on the seventh (7<sup>th</sup>) business day following receipt of such request. The Custodian denied access to the student notes taken during student interviews because they are exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1 as it contains ACD material. The Complainant states that the responsive student notes contain factual information obtained by the School District during the course of a non-criminal investigation and thus should not be considered exempt from disclosure under OPRA as ACD material.

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>6</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 exempt documents or privileged information as a result of *in camera* review by the GRC. The GRC’s obligation to maintain confidentiality and

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<sup>6</sup> Paff v. NJ Department of Labor, Board of Review, GRC Complaint No. 2003-128 (October 2005). James Sage v. Freehold Regional High School District (Monmouth), 2010-108 – Findings and Recommendations of the Executive Director

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 handwritten student notes to determine the validity of the Custodian’s assertion that the record contains ACD material which is exempt from disclosure under OPRA pursuant to N.J.S.A. 47:1A-1.1.

**Whether the Custodian’s failure to disclose the responsive handwritten student notes rises to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances?**

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

**Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. 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 handwritten student notes to determine the validity of the Custodian’s assertion that the record contains advisory, consultative or deliberative material which is exempt from disclosure under OPRA pursuant to N.J.S.A. 47:1A-1.1.
2. **The Custodian must deliver<sup>7</sup> to the Council in a sealed envelope nine (9) copies of the requested unredacted document (see #1 above), a document or redaction index<sup>8</sup>, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4<sup>9</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.**
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.

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<sup>7</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>8</sup> The document or redaction index should identify the document and/or each redaction asserted and the lawful basis for the denial.

<sup>9</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."

Prepared By: Harlynn A. Lack, Esq.  
Case Manager

Approved By: Catherine Starghill, Esq.  
Executive Director

February 15, 2011