



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
Commissioner

FINAL DECISION

July 29, 2014 Government Records Council Meeting

Kathryn H. Acosta, Esq.
(On behalf of Atlantic City Board of
Education)

Complainant

v.

NJ Department of Treasury, Division of
Pensions and Benefits
Custodian of Record

Complaint No. 2011-87

At the July 29, 2014 public meeting, the Government Records Council (“Council”) considered the July 22, 2014 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 this complaint be dismissed. The Complainant (via Counsel) withdrew her complaint in a letter to the Honorable Bruce M. Gorman, Administrative Law Judge, dated June 20, 2014, because this matter was settled. 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 29th Day of July, 2014

Robin Berg Tabakin, Esq., Chair
Government Records Council

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

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: July 31, 2014

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
July 29, 2014 Council Meeting**

Kathryn H. Acosta, Esq.
(on behalf of Atlantic City Board of Education)¹
Complainant

GRC Complaint No. 2011-87

v.

**New Jersey Department of Treasury,
Division of Pensions and Benefits²**
Custodian of Records

Records Relevant to Complaint: Pertaining to the determination by the Division of Pensions and Benefits (“Division”) that the Sick Leave Sell-Back Plan (“plan”) offered by the Atlantic City Board of Education (“ACBOE”) constituted an unauthorized early retirement incentive program:

1. Any and all correspondence, including e-mail communications between Milliman, Inc., and the Division.
2. Any and all reports and/or actuarial analyses prepared by Milliman, Inc., for the Division, including “draft” reports and/or “draft” actuarial analyses.
3. Any and all documents, materials and information supplied by the Division to Milliman, Inc., for purposes of preparing any and all reports and/or actuarial analyses, including “drafts.”
4. Any and all documents, materials and information supplied by Milliman, Inc., to the Division concerning any and all reports and/or actuarial analyses, including “drafts.”³

Custodian of Record: Florence Sheppard
Request Received by Custodian: January 13, 2011
Response Made by Custodian: January 25, 2011
GRC Complaint Received: March 17, 2011

Background

December 18, 2012 Council Meeting:

At its December 18, 2012 public meeting, the Council considered the November 20, 2012

¹ The Complainant is an attorney who filed the request on behalf of Atlantic City Board of Education. The current Counsel for the Atlantic City Board of Education is William S. Donio, Esq., of Cooper Levinson (Cherry Hill, NJ).

² Represented by, DAG Danielle P. Schimmel, on behalf of the NJ Attorney General. Previously represented by DAG Eileen Den Bleyker.

³ The Complainant requested two (2) additional items, which are not relevant to the adjudication of this complaint.

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:

[T]his matter should be transferred to the Office of Administrative Law to determine when the Division issued its decision that ACBOE's plan was an unauthorized ERI. This complaint should also be transferred to the Office of Administrative Law to determine whether the fourteen (14) records identified by the Custodian are releasable or exempt from disclosure as advisory, consultative and deliberative material and whether Ms. O'Hare and the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.

Procedural History:

On December 19, 2012, the Council distributed its Interim Order to all parties. On May 1, 2013, the complaint was transmitted to the Office of Administrative Law ("OAL").

On June 20, 2014, the Complainant's Counsel sent a letter to the Honorable Bruce M. Gorman, Administrative Law Judge, withdrawing this complaint because same was settled.

Analysis

No analysis required.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that this complaint be dismissed. The Complainant (via Counsel) withdrew her complaint in a letter to the Honorable Bruce M. Gorman, Administrative Law Judge, dated June 20, 2014, because this matter was settled. Therefore, no further adjudication is required.

Prepared By: Frank F. Caruso
Senior Case Manager

Approved By: Dawn R. SanFilippo, Esq.
Acting Executive Director

July 22, 2014



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
Commissioner

INTERIM ORDER

December 18, 2012 Government Records Council Meeting

Kathryn H. Acosta
(on behalf of Atlantic City Board of Education)
Complainant

Complaint No. 2011-87

v.

NJ Department of Treasury,
Division of Pensions & Benefits
Custodian of Record

At the December 18, 2012 public meeting, the Government Records Council ("Council") considered the November 20, 2012 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 this matter should be transferred to the Office of Administrative Law to determine when the Division issued its decision that ACBOE's plan was an unauthorized ERI. This complaint should also be transferred to the Office of Administrative Law to determine whether the fourteen (14) records identified by the Custodian are releasable or exempt from disclosure as advisory, consultative and deliberative material and whether Ms. O'Hare and the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.

Interim Order Rendered by the
Government Records Council
On The 18th Day of December, 2012

Robin Berg Tabakin, Chair
Government Records Council

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

Denise Parkinson Vetti, Secretary
Government Records Council

Decision Distribution Date: December 19, 2012



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
December 18, 2012 Council Meeting**

Kathryn H. Acosta, Esq.
(on behalf of Atlantic City Board of Education)¹
Complainant

GRC Complaint No. 2011-87

v.

**New Jersey Department of Treasury
Division of Pensions and Benefits²
Custodian of Records**

Records Relevant to Complaint: Pertaining to the determination by the Division of Pensions and Benefits (“Division”) that the Sick Leave Sell-Back Plan (“plan”) offered by the Atlantic City Board of Education (“ACBOE”) constituted an unauthorized early retirement incentive program:

1. Any and all correspondence, including e-mail communications between Milliman, Inc., and the Division.
2. Any and all reports and/or actuarial analyses prepared by Milliman, Inc., for the Division, including “draft” reports and/or “draft” actuarial analyses.
3. Any and all documents, materials and information supplied by the Division to Milliman, Inc., for purposes of preparing any and all reports and/or actuarial analyses, including “drafts.”
4. Any and all documents, materials and information supplied by Milliman, Inc., to the Division concerning any and all reports and/or actuarial analyses, including “drafts.”³

Request Made: January 12, 2011⁴

Response Made: January 25, 2011

Custodian: Florence Sheppard

GRC Complaint Filed: March 17, 2011⁵

¹ The Complainant is an attorney who filed the instant request on behalf of Atlantic City Board of Education. The current counsel for the Atlantic City Board of Education is William S. Donio, Esq., of Cooper Levinson (Cherry Hill, NJ).

² Represented by DAG Eileen Den Bleyker, on behalf of the NJ Attorney General.

³ The Complainant requested two (2) additional items, which are not relevant to the adjudication of this complaint.

⁴ The Complainant states that she submitted an OPRA request to the Department of Treasury on December 15, 2011, but the Custodian certified in the Statement of Information that she has no record of receiving the Complainant’s OPRA request until January 13, 2011.

⁵ The GRC received the Denial of Access Complaint on said date.

Background

December 15, 2010

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 indicates that the preferred method of delivery is U.S. Mail.

January 12, 2011

Facsimile and letter from the Complainant to the Custodian.⁶ The Complainant states that she submitted an OPRA request on December 15, 2010. The Complainant also states that to date she has not received any information, documents, or materials responsive or a denial to her request. The Complainant further states that the Custodian must respond to an OPRA request within seven (7) business days of receipt, if not, the Custodian has violated OPRA. The Complainant additionally states that if the Custodian fails to respond by January 14, 2011, she will file a Denial of Access Complaint in New Jersey Superior Court or with the Government Records Council ("GRC") to enforce ACBOE's rights to obtain any and all relief available under the law, including recovery of any and all attorney's fees incurred.

January 25, 2011

Manager of the Government Records Access Unit, Ms. Barbara O'Hare's ("Ms. O'Hare") response to the OPRA request. Ms. O'Hare responds in writing via letter to the Complainant's OPRA request on the seventh (7th) business day following receipt of such request.⁷ Ms. O'Hare requests additional time until February 1, 2011 to respond to the Complainant's request. Ms. O'Hare states that should the Complainant not agree with the extension, she should send back a response indicating this. Ms. O'Hare also states that if the Complainant does not respond, then she will proceed as though the Complainant approved the extension of time.

February 1, 2011

Letter from Ms. O'Hare to the Complainant. Ms. O'Hare requests an additional two (2) business days to process the Complainant's request. Ms. O'Hare states that the additional time is necessary to continue the legal review of the records responsive to the request.

February 3, 2011

Letter from Ms. O'Hare to the Complainant. Ms. O'Hare states that access to the records responsive to request Items No. 1 through No. 4 are exempt from disclosure as advisory, consultative and deliberative ("ACD") material. Ms. O'Hare states that these records are also denied pursuant to Executive Order 26 (McGreevey 2002), Education Law Center v. New Jersey Department of Education, 198 N.J. 274 (2009) and N.J.S.A. 47:1A-1.1.

⁶ The Complainant attaches another copy of her OPRA request. The Complainant also includes a copy of the facsimile confirmation indicating that this facsimile was successfully sent.

⁷ The Custodian certifies in the SOI that she received the Complainant's OPRA request on January 13, 2011. The Custodian certifies that she did not receive the Complainant's OPRA request sent on December 15, 2010.

March 17, 2011

Denial of Access Complaint filed with the GRC with the following attachments:

- Complainant's OPRA request dated December 15, 2010
- Letter from the Complainant to the Custodian dated January 12, 2011
- Letter from Ms. O'Hare to the Complainant dated January 25, 2011
- Letter from Ms. O'Hare to the Complainant dated February 1, 2011
- Letter from Ms. O'Hare to the Complainant dated February 3, 2011⁸

The Complainant states that she filed an OPRA request on December 15, 2010 seeking the records relevant to this matter listed above. The Complainant also states that she did not receive a response to her OPRA request. The Complainant further states that she sent a follow up letter via U.S. Mail and facsimile indicating that she did not receive a response to her OPRA request dated December 15, 2010.

The Complainant states that she received a telephone call from Supervising Administrative Analyst, Ms. Cynthia Jablonski ("Ms. Jablonski") stating that she never received the Complainant's OPRA request dated December 15, 2010. The Complainant also states that Ms. O'Hare responded via letter to the Complainant's OPRA request on January 25, 2011 and requested until February 1, 2011 to respond to the Complainant's request. The Complainant argues that Ms. O'Hare responded more than seven (7) business days after receipt of such request.⁹ The Complainant states that Ms. O'Hare responded on February 1, 2011 requesting an additional two (2) business days to process the Complainant's request. The Complainant also states that Ms. O'Hare finally responded on February 3, 2011 via letter denying access to the records responsive to the request because such records constitute ACD material.

The Complainant argues that the records responsive to her request do not constitute ACD material. The Complainant also argues that in order for the ACD privilege to apply, two (2) conditions must be satisfied: 1) the record in question was generated before the adoption of an agency's policy or decision and 2) the record must be deliberative in nature, containing opinions, recommendations or advice about agency policies. Education Law Center v. New Jersey Department of Education, 198 N.J. 274 (2009), Gannett New Jersey Partners, LP v. County of Middlesex, 379 N.J. Super. 205 (App. Div. 2005).

The Complainant further argues that since the ACD privilege is qualified, the records responsive can still be obtained if the need for the materials outweighs the government's interest in confidentiality. The Complainant argues that the following factors must be considered in determining whether the need for the materials outweighs the government's interest in confidentiality: "1) the relevance of the evidence; 2) the availability of other evidence; 3) the government's role in the litigations; and 4) the extent to which disclosure would hinder frank and independent discussion regarding contemplated policies and decisions." In Re Liquidation of Integrity Insurance Company, 165 N.J. 75 (2000). The Complainant states that the New Jersey Supreme

⁸ The Complainant attaches additional correspondence not relevant to the adjudication of this complaint.

⁹ Ms. O'Hare responded on the seventh (7th) business day because January 17, 2011 was a State Holiday. Kathryn H. Acosta, Esq. (on behalf of Atlantic City Board of Education) v. New Jersey Department of Treasury, Division of Pensions & Benefits, 2011-87 – Findings and Recommendations of the Executive Director

Court stated that “a court must recognize the difference between factual material that is part of the formulation or exercise of policy-oriented judgment from factual material that is not.” Education Law Center 198 N.J. at 295. The Complainant also states that the New Jersey Supreme Court stated “pre-decisional documents do not lose their protection from unwarranted public scrutiny merely because they may contain numerical or statistical data or information used in the development of, or the deliberation on a possible government action.” Id.

The Complainant further states that another significant case is Tractenberg v. Township of West Orange, 416 N.J. Super. 354 (App. Div. 2010). The Complainant states in Tractenberg, *supra*, the Appellate Division sought to resolve “whether property appraisals performed by a private appraiser at the behest of the West Orange Council fall within the deliberative process exemption of [OPRA].” The Complainant also states that the Appellate Division held that the Township of West Orange produced sufficient evidence to demonstrate that the property appraisals were “part of the process leading to the formulation of an agency decision on whether to acquire the Highlands.” The Complainant further states that the Appellate Division held that with regard to “the second prong under the newly amplified law announced in *Education Law Center*...the Township produced no evidence that the appraisals have the potential to ‘reflect or to expose the deliberative aspects of that process...’ or to ‘expose the deliberative aspects for the Township’s process of determining whether to acquire the Highlands.’” Id. at 371-373. The Complainant additionally states that the Appellate Division also noted that the Simulation memo in Education Law Center was factually and critically distinguishable from the property appraisals because while both contain raw data “there was no indication...that the property appraisals...contain any recommendation as to whether the Township should acquire the Highlands.” Lastly, the Complainant states that the Appellate Division held that the property appraisals “do not have the capacity to expose the Township’s deliberative thought-processes’ because they are ‘at most...intended to...provide raw data of a factual nature upon which decisions could be made.’” Id.

The Complainant asserts that the information, documents and material sought were created after the Department had already determined that the plan was an unauthorized early retirement incentive (“ERI”), thus, it is impossible for the production of this information to somehow unveil or lend insight into how or why the Department reached its decision. The Complainant also asserts that the Division’s Supervisor of External Audit, Mr. Michael R. Czyzyk (“Mr. Czyzyk”) informed the Complainant in a letter dated October 8, 2009 that after reviewing these records and materials that the ACBOE submitted to the Division that ACBOE’s plan could adversely affect the Public Employees Retirement System (“PERS”) and the Teachers’ Pension and Annuity Fund (“TPAF”). The Complainant argues that as of October 8, 2009 the Division had already determined that the plan offered by ACBOE was an unauthorized ERI. The Complainant further asserts that any records created after October 8, 2009 do not relate to “how” or “why” the Division rendered its decision and instead relate to the collateral consequences of its determination. Thus, the Complainant argues that the Division cannot argue that any and all records and materials, including drafts, were generated, prepared or obtained after October 8, 2009 are now subject to the ACD privilege.

The Complainant argues that even if the GRC finds that the ACD privilege applies, the privilege does not extend to “[p]urely factual material that does not reflect the deliberative processes.” Education Law Center 198 N.J. at 287. The Complainant also argues that “strictly factual material should not be confidential because the disclosure of such material would not chill free communication and deliberation due to the static nature of facts as compared to the dynamic nature of opinions. The Complainant requests the GRC order the Division to redact any ACD material and to disclose the factual material.

The Complainant does not agree to mediate this complaint.

April 6, 2011

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

April 11, 2011

E-mail from Custodian’s Counsel to the GRC. Counsel requests a five (5) business day extension to complete the SOI.

April 11, 2011

E-mail from the GRC to Custodian’s Counsel. The GRC grants Counsel’s request for a five (5) business day extension to complete the SOI. The GRC states that the SOI is due by April 20, 2011.

April 20, 2011

Custodian’s SOI with no attachments.

The Custodian certifies that the Division was requested to provide specific documentation in response to the Complainant’s OPRA request.¹⁰

The Custodian certifies that the Department received the Complainant’s OPRA request on January 13, 2011. The Custodian certifies that although the OPRA request is dated December 15, 2010, the Division did not receive it until after the Complainant contacted the Custodian to determine the status and thus the Custodian did not receive such request until January 13, 2011. The Custodian also certifies that after several short extensions, Ms. O’Hare responded to the Complainant’s OPRA request on February 3, 2011 via letter advising the Complainant that OPRA excludes intra-agency ACD material from those records subject to inspection, copying or examination and thus the records sought were not disclosable.

Counsel states that the Complainant is an attorney representing ACBOE. Counsel also states that the Complainant filed an OPRA request because the Division cited ACBOE for a violation of the rules concerning the TPAF, by implementing an unauthorized ERI plan. Counsel further states that the Division found that ACBOE’s ERI caused financial harm to the pension fund by providing monetary incentives to retirement

¹⁰ The Custodian did not certify whether any records responsive to the Complainant’s OPRA request were destroyed in accordance with the Records Destruction Schedule established and approved by Records Management Services as is required pursuant to Paff v. NJ Department of Labor, 392 N.J. Super. 334 (App. Div. 2007).

eligible employees, accelerating the retirement of its employees. Counsel additionally states that as a result, the Division requested the State actuary to provide the amount ACBOE was required to reimburse the Division for the accelerated costs involved. Counsel states that at its regular monthly meeting on December 2, 2010, the TPAF Board of Trustees (“TPAF Board”) adopted the Division’s recommendation. Counsel also stated that this decision is not the final agency decision and the matter still remains pending before the TPAF Board.

The Custodian certifies that the Division and TPAF Board are required to rely on the expertise of the State actuary to conduct actuarial investigations and analyses to determine the Fund’s assets and liabilities pursuant to N.J.S.A. 18A:66-58. The Custodian also certifies that this requires the Division and ACBOE to take into consideration the recommendations of the actuary. The Custodian further certifies that the general reports are prescribed by statute are public once adopted by the TPAF Board.

The Custodian certifies that in the event of an ERI, it is necessary to provide the State actuary with a list of affected employees provided by the employer in order to determine the accelerated pension costs incurred by the TPAF as a result of the ERI. The Custodian also certifies that the Complainant’s request is directed toward this confidential actuary report. The Custodian further certifies that the TPAF Board has not issued its initial decision with respect to ACBOE’s ERI. The Custodian further certifies that the confidentiality of communications between and among Division staff with the State actuary or its consultants is important to the Division in its role as the State agency designated to administer the pension funds. The Custodian additionally certifies that the TPAF Board has no employees and is currently relying on the Division staff to provide supportive services. The Custodian certifies that the intra-agency communications as well as communications by Division staff with the State actuary, contain data and other materials that are ACD and advise the Division and TPAF Board in relation to their duties as fiduciaries of the pension fund. The Custodian also certifies that, as required by statute, communications from Division employees with actuarial consultants assist the Division and TPAF Board in policy development and implementation.

The Custodian certifies that in response to the Complainant’s request, she determined that the Division maintained the records responsive to the Complainant’s request and after review confirmed that such records contain ACD recommendations in relation to the Division’s internal affairs. The Custodian also certifies that because portions of the requested records were ACD in nature, they were not government records pursuant to N.J.S.A. 47:1A-1.1. The Custodian further certifies that the remaining portions of the records contained official information regarding the Division’s internal affairs and were compiled by Division employees acting within the course and scope of their duties.

The Custodian certifies that there are fourteen (14) records responsive to the Complainant’s OPRA request which were not releasable pursuant to N.J.S.A. 47:1A-1.1 and Executive Order 26. These records include:

1. Letter from Scott Porter of Milliman Actuary to Henry Matwiejewicz of the Division of Pension and Benefits regarding the determination of the additional

- pension liability as of July 1, 2009 due to the unauthorized ERI offered by the BOE in the TPAF.
2. E-mails between Henry Matwiejewicz and Mr. Czyzyk of the Division regarding BOE: ERI Pension Liability Calculation.
 3. E-mails between Janet Cranna of Buckconsultants and Henry Matwiejewicz of the Division regarding BOE's: ERI Pension Liability Calculation.
 4. E-mails between Janet Cranna of Buckconsultants and Henry Matwiejewicz of the Division regarding BOE's: ERI Pension Liability Calculation dated October 14, 2009.
 5. E-mail between Henry Matwiejewicz and Susanne Culliton dated August 20, 2009 regarding BOE document.
 6. E-mails between Janet Cranna and Henry Matwiejewicz dated October 14, 2009 regarding BOE ERI Pension Liability Calculation.
 7. E-mails between Fredrick Beaver, former Division Director and Henry Matwiejewicz dated November 10, 2009, regarding BOE ERI Pension Liability Calculation indicating to prep documents for signature.
 8. E-mails between Henry Matwiejewicz and Mr. Czyzyk dated November 6, 2009, regarding BOE ERI Pension Liability Calculation.
 9. E-mails between Henry Matwiejewicz and Scott Porter dated October 8, 2009 and October 13, 2009, regarding BOE: ERI Pension Liability Calculation.
 10. E-mail between Mr. Matwiejewicz and Mr. Czyzyk dated October 13, 2009, regarding BOE Violation Letter Clarification document.
 11. Four (4) e-mails between Mr. Matwiejewicz and Mr. Czyzyk dated October 7, 2009 regarding BOE's Unauthorized ERI.
 12. E-mail between Mr. Czyzyk and Susanne Culliton dated October 6, 2009 regarding BOE Violation Letter document.
 13. E-mails between Mr. Matwiejewicz and Mr. Czyzyk dated November 10, 2009 regarding BOE ERI.
 14. E-mail between Mr. Czyzyk and Ms. Culliton dated June 23, 2010 regarding BOE ERI.

June 29, 2011

E-mail from the Complainant to the GRC responding to the Custodian's SOI. The Complainant states that Mr. Czyzyk sent a letter to ACBOE on August 20, 2009 stating that the Division received information that ACBOE has authorized an ERI and requested that ACBOE to provide documentation regarding this ERI. The Complainant also states that according to Mr. Czyzyk's letter dated August 20, 2009, the Division has the responsibility to "administer regulations established to safeguard the integrity of the various retirement systems." The Complainant asserts that Mr. Czyzyk sent a letter to ACBOE on October 8, 2009, that the Division determined that the plan offered by ACBOE was an unauthorized ERI. The Complainant also asserts that Mr. Czyzyk's letter dated October 8, 2009 did not mention that the Division's determination was contingent upon any review, further action, ratification or approval by the TPAF Board. The Complainant states that once the Division obtained the actuarial analysis, former Director of the Division, Mr. Frederick Beaver ("Mr. Beaver") sent ACBOE a letter on November 12, 2009, requesting ACBOE to remit payment of \$2,977,600 for the actuarial costs incurred by the Division. The Complainant asserts that if the Division's decision on October 8, 2009 was truly pre-decisional, then the Division would not have directed

ACBOE to remit payment of \$2,977,600 and instead would have been informed of the next steps in the determination process.

The Complainant states that ACBOE filed a petition of appeal with the Division on November 23, 2009. The Complainant also states that Secretary of the TPAF Board sent ACBOE a letter on October 25, 2010 informing ACBOE's appeal will be considered at the TPAF Board meeting on December 2, 2010. The Complainant states that at TPAF Board meeting on December 2, 2010 the TPAF Board determined that ACBOE's plan was an unauthorized ERI. The Complainant argues that anything after the Division's decision on October 8, 2009 is not subject to the ACD privilege and must be provided to ACBOE.

The Complainant also argues that even if the actuarial analyses responsive to request Item No. 2 were generated prior to the TPAF Board meeting December 2, 2010, this exemption cannot apply to all the actuarial analyses because said analyses do not contain opinions, recommendations, provide guidance and do not assist in the formulation of an agency decision.

The Complainant also argues that even if the ACD privilege applies to the requested records, ACBOE's need for the requested records substantially outweighs the government's interest in confidentiality. The Complainant further argues that the requested records are relevant to ACBOE's appeal of the TPAF Board determination that the plan was an unauthorized an ERI. The Complainant additionally argues that release of these records would not hinder independent discussions regarding contemplated policies and decision, namely whether a specific program is permissible or impermissible, because the actuarial analyses is wholly independent of this decision. The Complainant argues that the Division's failure to provide the requested records is problematic, because the Division and the TPAF Board expects ACBOE without objection or an opportunity to review will simply remit payment \$2,977,600 as a result of an unauthorized ERI. Lastly, the Complainant argues that ACBOE should be offered the opportunity to review this information and to independently authorize whether the additional pension liability and the basis is accurate or if revisions need to be made.

Analysis

Whether Ms. O'Hare unlawfully denied access to the requested records?

OPRA provides that:

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

Additionally, OPRA defines a government record as:

"... any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document,

information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof, that has been *made, maintained or kept on file ... or that has been received* in the course of his or its official business ...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.

The Council notes that the Complainant’s OPRA request is invalid because it fails to specifically identify government records. The Complainant’s request Item No. 1 fails to identify a date range and who wrote the correspondence or e-mails. The Complainant’s request Item No. 2 through No. 4 fails so specify identifiable government records sought because the terms “documents,” “materials” and “information” are generic search terms. The Custodian would not only have to search, but research for all records responsive to the Complainant’s request. See MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005), Bent v. Stafford Police Department, 381 N.J. Super. 30 (App. Div. 2005), New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007).

However, the Custodian identified fourteen (14) records responsive to the Complainant’s request in the SOI which were not releasable because such records contained ACD material. Thus, the Council must address whether these fourteen (14) records responsive to the Complainant’s request are releasable under OPRA. See Gannett v. County of Middlesex, 379 N.J. Super. 205 (App. Div. 2005).

In the instant complaint, Ms. O’Hare timely responded in writing to the Complainant’s OPRA request stating that access to the records responsive to request Items No. 1 through No. 4 are exempt from disclosure as ACD material. Conversely, the Complainant stated in the Denial of Access Complaint that information, documents and material sought were created after the Department had determined that ACBOE’s plan was an unauthorized ERI. The Complainant asserted in the Denial of Access Complaint that Mr. Czyzyk informed the Complainant in a letter dated October 8, 2009 that after reviewing documentation submitted by ACBOE to the Division, ACBOE’s plan would adversely affect PERS and TPAF. The Complainant argued in the Complaint that any records created after October 8, 2009 do not relate to how or why the Division rendered

its decision. The Complainant also stated in her letter to the GRC dated June 29, 2011 that ACBOE filed a petition of appeal with the Division on November 23, 2009. Custodian's Counsel stated in the SOI that the Division found that ACBOE's ERI caused financial harm to the pension fund by providing monetary incentives to retirement eligible employees. Counsel also stated in the SOI that the TPAF Board adopted the Division's recommendation on December 2, 2010.¹¹ Counsel also stated that this decision is not the final decision and the matter still remains pending before the TPAF Board.

However, there appears to be material questions of fact regarding when ACBOE's plan was determined to be an unauthorized ERI. The Complainant argued in the Denial of Access Complaint that any correspondence after Mr. Czyzyk's letter dated October 8, 2009 should be releasable because that is when the Division made such a determination. Custodian's Counsel argued in the SOI that the TPAF Board adopted the Division's recommendation on December 2, 2010; however, Counsel also stated that this decision is not final and is still pending before the TPAF Board.

Therefore, this matter should be transferred to the Office of Administrative Law to determine when the Division issued its decision that ACBOE's plan was an unauthorized ERI. This complaint should also be transferred to the Office of Administrative Law to determine whether the fourteen (14) records identified by the Custodian are releasable or exempt from disclosure as ACD and whether Ms. O'Hare and the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that this matter should be transferred to the Office of Administrative Law to determine when the Division issued its decision that ACBOE's plan was an unauthorized ERI. This complaint should also be transferred to the Office of Administrative Law to determine whether the fourteen (14) records identified by the Custodian are releasable or exempt from disclosure as advisory, consultative and deliberative material and whether Ms. O'Hare and the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.

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

Approved By: Karyn Gordon, Esq.
Acting Executive Director

November 20, 2012¹²

¹¹ Mr. Czyzyk's letter to the Complainant dated October 8, 2009 does not state that the TPAF Board must adopt the Division's recommendation.

¹² This complaint was prepared and scheduled for adjudication at the Council's November 27, 2012 meeting; however, said meeting was cancelled due to a lack of a quorum.