



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
101 SOUTH BROAD STREET
PO Box 819
TRENTON, NJ 08625-0819

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

CHARLES A. RICHMAN
Commissioner

FINAL DECISION

May 24, 2016 Government Records Council Meeting

Michael I. Inzelbuch
Complainant

Complaint No. 2013-145

v.

Lakewood Board of Education (Ocean)
Custodian of Record

At the May 24, 2016 public meeting, the Government Records Council (“Council”) considered the May 17, 2016 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian complied with the Council’s April 26, 2016 Interim Order because he responded within the prescribed period by providing records and simultaneously providing certified confirmation of compliance to the Executive Director.
2. The Custodian unlawfully denied access to the redacted portions of the records identified in the Council’s April 26, 2016 Interim Order. However, the Custodian produced the identified records without redactions to the Complainant in compliance with the Interim Order. 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, 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 24th Day of May, 2016

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: May 27, 2016

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
May 24, 2016 Council Meeting**

**Michael I. Inzelbuch¹
Complainant**

GRC Complaint No. 2013-145

v.

**Lakewood Board of Education (Ocean)²
Custodial Agency**

Records Relevant to Complaint:

April 26, 2013 OPRA request: Inspection of:

1. [Schwartz, Simon, Edelstein & Celso, LLC, hereinafter “the Firm” or “Firm”] bills to review from OCTober [sic] 2012 to current[.]”
2. “[T]he resume, credentials, and resignation letter of Christopher Brick.”
3. “Any and all information as to the Agenda item as to TOK (Tree of Knowledge), to wit, the back up as to the program listed on the Agenda.”
4. “[Lakewood Board of Education, hereinafter “the Board” or “Board”] action notes (or whatever) [sic] available on the 2 [Office of Administrative Law]/litigation matters that were listed on the Agenda.”

April 29, 2013 OPRA request: Hardcopies of:

1. “Firm bills, payment vouchers and backup for the period of October 2012 to current (April 2013) . . . any and all contracts as to this Firm providing services to the Board . . . any and all documentation that the Board considered when hiring this Firm.”
2. “The resume, credentials and resignation letter of Asst. B. A. Christopher Brick.”
3. “Any and all information as to the Agenda item as to TOK (Tree of Knowledge), to wit, the back up as to the program listed on the Agenda of Thursday, April 25, 2013 (Page 9, Letters O and P – see attached).
 - a. “[I]nclude the [Request for Proposal hereinafter “RFP”], all responses to the RFP, and the source of funds.
 - b. “[A]ny and all e-mails/correspondence/documentation of the Business office including, but not limited, to the purchasing agent who notified [Tree of Knowledge] prior to the meeting that they were the successful bidder.”
 - c. “[T]he prior RFP (of this year) for same services and any and all documentation that would serve as the basis for the rejection of same.
 - d. “[T]ally sheets and/or review of proposals for same.”

¹ No legal representation listed on record.

² Represented by James Eric Andrews, Esq., of Schenck, Price, Smith & King, LLP (Florham Park, NJ).

4. "Any and all correspondence written by the Firm since April 2012 to present with regard to Michael I Inzulbuch, Esq."
5. "Any and all correspondence written by the Firm to Bowman and Company and/or Jared Corn and/or received from same since April 2012 to present."
6. "Any and all plans/reports/memos/documentation authored by the Board or its employees/consultants/agents since April 2012 with regard to transportation and the possible savings of monies including, but not limited, to a document from President [of the Board] Carl Fink, referenced to the [Ocean] County Superintendent."
7. "Any and all financial reports provided to the [New Jersey Department of Education] and/or the [Ocean] County office since July 2012 to current as to the fiscal stability (or lack thereof) of the [Lakewood School District, hereinafter "the District" or "District"]."
8. "Any and all notices/correspondence/e-mails, etc., sent to any District staff that there is a spending freeze for the current school year and any and all documentation that would support the basis for said freeze."
9. "The cv/resume/credentials for the district purchasing agent."

May 1, 2013 OPRA request: Hardcopies of:

1. "Any and all Board approval(s) or notice to the Board with regard to [the Complainant] since April 2012 including but not limited to Lakewood Bd. v. Inzulbuch in Ocean County Superior Ct."
2. "Any and all e-mails from Pres. Carl Fink to Laura Winters, Helen Tosia, or Business Office since April 2012."

Custodian of Record: Thomas D'Ambola

Request Received by Custodian: April 29, 2013, May 1, 2013

Response Made by Custodian: April 29, 2013

GRC Complaint Received: May 21, 2013

Analysis

Compliance

At its April 26, 2016 meeting, the Council ordered the Custodian to provide the Complainant with those portions of the requested records not exempt from disclosure. The Counsel further required the Custodian to submit certified confirmation of compliance, in accordance with R. 1:4-4, to the Executive Director. On April 28, 2016, the Council distributed its Interim Order to all parties, providing the Custodian five (5) business days to comply with the terms of said Order. Thus, the Custodian's response was due by close of business on May 5, 2016.

On May 4, 2016, the fourth (4th) business day after receipt of the Council's Order, the Custodian submitted certified confirmation of compliance to the GRC, via email.

Therefore, the Custodian complied with the Council's April 26, 2016 Interim Order because he responded within the prescribed period by providing records and simultaneously providing certified confirmation of compliance to the Executive Director.

Knowing & Willful

OPRA states that “[a] public official, officer, employee or custodian who knowingly and 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 “[i]f 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 (*id.*; Marley v. Borough of Palmyra, 193 N.J. Super. 271, 294-95 (Law Div. 1993)); 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 unlawfully denied access to the redacted portions of the records identified in the Council’s April 26, 2016 Interim Order. However, the Custodian produced the identified records without redactions to the Complainant in compliance with the Interim Order. 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, 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. The Custodian complied with the Council’s April 26, 2016 Interim Order because he responded within the prescribed period by providing records and simultaneously providing certified confirmation of compliance to the Executive Director.
2. The Custodian unlawfully denied access to the redacted portions of the records identified in the Council’s April 26, 2016 Interim Order. However, the Custodian produced the identified records without redactions to the Complainant in compliance with the Interim Order. 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, 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: Samuel A. Rosado
Staff Attorney

May 17, 2016



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
101 SOUTH BROAD STREET
PO Box 819
TRENTON, NJ 08625-0819

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

CHARLES A. RICHMAN
Commissioner

INTERIM ORDER

April 26, 2016 Government Records Council Meeting

Michael I Inzelbuch
Complainant

Complaint No. 2013-145

v.

Lakewood Board of Education (Ocean)
Custodian of Record

At the April 26, 2016 public meeting, the Government Records Council (“Council”) considered the March 22, 2016 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian complied with the Council’s January 30, 2015, Interim Order because he provided certified confirmation of compliance to the Executive Director in accordance with N.J. Court Rule 1:4-4 and submitted nine (9) redacted and unredacted copies of the requested records for an *in camera* review within the extended time allotted to respond.
2. With the two exceptions listed in the table above, the Custodian properly made redactions on the basis of attorney-client privilege. Unlike in White, where the custodian redacted the name of a homeowner who had threatened to sue the Board of Education, the Custodian’s redactions here pertained to theories, mental impressions, and/or evaluation of liability of a variety of legal matters facing the Board. Such are valid reasons to redact pursuant to attorney-client privilege. N.J.S.A. 47:1A-1.1. *See also White v. Monmouth Reg’l High Sch.*, GRC Complaint No. 2012-218 (Interim Order dated September 24, 2013) (*citing The Press of Atlantic City v. Ocean Cnty. Joint Ins. Fund*, 337 N.J. Super. 480, 487 (Law Div. 2000), and In re Env’tl. Ins. Actions, 259 N.J. Super. 308, 313 (App. Div. 1992)). Furthermore, because the Custodian certified that he provided without redactions all responsive correspondence between the Firm and Lakewood Board of Education regarding the Complainant, an *in camera* review of same was unnecessary.
3. The Custodian bore his burden of proving that he lawfully redacted the responsive attorney bills to protect the names and initials of parents, students, and employees. White v. Monmouth Reg’l High Sch., GRC Complaint No. 2012-218 (Interim Order dated September 24, 2013), N.J.A.C. 6A:32-7.1, *et seq*; FERPA; and N.J.S.A. 47:1A-10.



4. **The Custodian shall comply with the Council's Findings of the *In Camera* Examination set forth in the above table within five (5) business days from receipt of this Order and simultaneously provide certified confirmation of compliance pursuant to N.J. Court Rule 1:4-4 to the Executive Director.¹**
5. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Interim Order Rendered by the
Government Records Council
On The 26th Day of April, 2016

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: April 28, 2016

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

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

***In Camera* Findings and Recommendations of the Executive Director
April 26, 2016 Council Meeting**

**Michael I. Inzelbuch¹
Complainant**

GRC Complaint No. 2013-145

v.

**Lakewood Board of Education (Ocean)²
Custodial Agency**

Records Relevant to Complaint:

April 26, 2013 OPRA request: Inspection of:

1. [Schwartz, Simon, Edelstein & Celso, LLC, hereinafter “the Firm” or “Firm”] bills to review from October [sic] 2012 to current[.]”
2. “[T]he resume, credentials, and resignation letter of Christopher Brick.”
3. “Any and all information as to the Agenda item as to TOK (Tree of Knowledge), to wit, the back up as to the program listed on the Agenda.”
4. “[Lakewood Board of Education, hereinafter “the Board” or “Board”] action notes (or whatever) [sic] available on the 2 [Office of Administrative Law]/litigation matters that were listed on the Agenda.”

April 29, 2013 OPRA request: Hardcopies of:

1. “Firm bills, payment vouchers and backup for the period of October 2012 to current (April 2013) . . . any and all contracts as to this Firm providing services to the Board . . . any and all documentation that the Board considered when hiring this Firm.”
2. “The resume, credentials and resignation letter of Asst. B. A. Christopher Brick.”
3. “Any and all information as to the Agenda item as to TOK (Tree of Knowledge), to wit, the back up as to the program listed on the Agenda of Thursday, April 25, 2013 (Page 9, Letters O and P – see attached.
 - a. “[I]nclude the [Request for Proposal hereinafter “RFP”], all responses to the RFP, and the source of funds.
 - b. “[A]ny and all e-mails/correspondence/documentation of the Business office including, but not limited, to the purchasing agent who notified [Tree of Knowledge] prior to the meeting that they were the successful bidder.”
 - c. “[T]he prior RFP (of this year) for same services and any and all documentation that would serve as the basis for the rejection of same.
 - d. “[T]ally sheets and/or review of proposals for same.”

¹ No legal representation listed on record.

² Represented by James Eric Andrews, Esq., of Schenck, Price, Smith & King, LLP (Florham Park, NJ).

4. "Any and all correspondence written by the Firm since April 2012 to present with regard to Michael I Inzulbuch, Esq."
5. "Any and all correspondence written by the Firm to Bowman and Company and/or Jared Corn and/or received from same since April 2012 to present."
6. "Any and all plans/reports/memos/documentation authored by the Board or its employees/consultants/agents since April 2012 with regard to transportation and the possible savings of monies including, but not limited, to a document from President [of the Board] Carl Fink, referenced to the [Ocean] County Superintendent."
7. "Any and all financial reports provided to the [New Jersey Department of Education] and/or the [Ocean] County office since July 2012 to current as to the fiscal stability (or lack thereof) of the [Lakewood School District, hereinafter "the District" or "District"]."
8. "Any and all notices/correspondence/e-mails, etc., sent to any District staff that there is a spending freeze for the current school year and any and all documentation that would support the basis for said freeze."
9. "The cv/resume/credentials for the district purchasing agent."

May 1, 2013 OPRA request: Hardcopies of:

1. "Any and all Board approval(s) or notice to the Board with regard to [the Complainant] since April 2012 including but not limited to Lakewood Bd. v. Inzulbuch in Ocean County Superior Ct."
2. "Any and all e-mails from Pres. Carl Fink to Laura Winters, Helen Tosia, or Business Office since April 2012."

Custodian of Record: Thomas D'Ambola

Request Received by Custodian: April 29, 2013, May 1, 2013

Response Made by Custodian: April 29, 2013

GRC Complaint Received: May 21, 2013

Records Submitted for *In Camera* Examination: Attorney billing statements between Schwartz, Simon, Edelstein & Celso, LLC ("Firm") and Lakewood Board of Education ("Board") from October 2012 to April 2013; any and all correspondence written by the Firm from April 2012 to April 2013 regarding Michael I. Inzulbuch, Esq.

Background

January 30, 2015 Council Meeting:

At its January 30, 2015 public meeting, the Council considered the January 20, 2015, Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. The Custodian's failure to respond in writing to the Complainant's April 26, 2013, April 29, 2013 and May 1, 2013 OPRA requests, either granting access, denying access, seeking clarification, or requesting an extension of time within the statutorily

mandated seven (7) business days, results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order dated October 31, 2007). Furthermore, the Custodian’s failure to provide immediate access to the Complainant’s April 26, 2013 and April 29, 2013 OPRA requests seeking bills, payment vouchers, and contracts also results in a “deemed” denial. N.J.S.A. 47:1A-5(e). See Burdick, Jr. v. Twp. of Franklin (Hunterdon), GRC Complaint No. 2010-99 (Interim Order dated March 27, 2012); Carter v. Franklin Fire District No. 2 (Somerset), GRC Complaint Nos. 2011-124, 125, 126, 127 (Interim Order dated October 25, 2011); Wolosky v. Borough of Mount Arlington (Morris), GRC Complaint No. 2010-210 (Interim Order dated November 29, 2011). However, notwithstanding the Custodian’s “deemed denial,” the Council declines to order production of responsive records to Item Nos. 1-4 of the Complainant’s April 26, 2013 OPRA request, and Item Nos. 1-3 & 5-9, of the Complainant’s April 29, 2013 OPRA request, as the Custodian certified and provided evidence that responsive records to same were produced on or around June 26, 2013.

2. The GRC must conduct an *in camera* review of all redacted attorney billing statements to determine the validity of the Custodian’s assertion that these billing statements contain personnel material, attorney-client privileged material, and student information. See Paff v. NJ Dep’t of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005); N.J.S.A. 47:1A-10; N.J.S.A. 47:1A-1.1; and N.J.A.C. 6A:32-7.1, et seq.
3. The GRC must conduct an *in camera* review of responsive records withheld from disclosure as containing attorney-client privileged material to determine the validity of the Custodian’s assertion that correspondence between the Firm and the Board regarding the Complainant are exempt from disclosure *in toto* for containing attorney-client privileged communications. See Paff v. NJ Dep’t of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005); N.J.S.A. 47:1A-1.1.
4. The Custodian failed to prove his burden that he lawfully denied access to the responsive correspondence because the claim that the Complainant had previously obtained the records in relation to litigation is not a lawful basis for denial under OPRA. N.J.S.A. 47:1A-6; Caggiano v. Borough of Stanhope (Sussex), GRC Complaint No. 2005-211 (January 2006). Thus, the Custodian shall disclose the records.
5. Notwithstanding the Custodian’s “deemed” denial, he did not unlawfully deny access to the requested e-mails as the request is invalid for failing to identify a specific subject or content matter. N.J.S.A. 47:1A-6; Elcavage v. West Milford Twp. (Passaic), GRC Complaint No. 2009-07 (April 2010); Sandoval v. NJ State Parole Bd., GRC Complaint No. 2006-167 (Interim Order dated March 28, 2007).

6. **The Custodian must deliver³ to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see paragraphs 2 & 3 above), nine (9) copies of the redacted records, a document or redaction index⁴, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,⁵ that the records provided are the records requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**
7. **The Custodian shall comply with paragraph 4 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,⁶ to the Executive Director.⁷**
8. 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.

Procedural History:

On February 3, 2015 the Council distributed its Interim Order to all parties. On February 25, 2015, the Custodian responded in part to the Council's Interim Order, submitting nine (9) redacted and unredacted copies of attorney billing statements and correspondence. On March 9, 2015, the Custodian provided the Complainant with records identified under paragraph 4 of the Interim Order. On March 19, 2015, the Custodian provided certified confirmation of compliance to the Executive Director, stating that no additional responsive records were located. The Custodian certified that the legal explanations for said redactions are as follows:

- The Family Education Rights and Privacy Act ("FERPA"); N.J.A.C. 6A:32-7.1, *et seq.* - parents' and students' names and initials.
- N.J.S.A. 47:1A-10 - personnel information.
- N.J.S.A. 47:1A-1.1 - attorney-client privilege.

³ The *in camera* records 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.

⁴ The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

⁵ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

⁶ "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."

⁷ Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

Analysis

Compliance

At its January 30, 2015, meeting, the Council ordered the Custodian to submit nine (9) redacted and unredacted copies of attorney billing statements from October 2012 to April 2013, and correspondence between the Firm and the Board regarding the Complainant from April 2012 to April 2013 for *in camera* review. The Custodian was also ordered to provide the Complainant with correspondence withheld under the premise that the Complainant already possessed same as result of litigation. The Custodian was to submit certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director. On February 3, 2015, the Council distributed its Interim Order to all parties, providing the Custodian five (5) business days to comply with the terms of said Order. Thus, the Custodian's response was due by close of business on Tuesday, February 10, 2015.

On February 9, 2015, the Custodian requested an extension of time to respond to the Council's Interim Order. The GRC granted the Custodian an additional ten (10) business days to respond, February 25, 2015.

The Custodian provided a partial response on February 25, 2015, and requested additional time to respond to the Interim Order. The Custodian explained that because the request for e-mails did not identify specific members of the Firm, the search for responsive records was more expansive than anticipated. The GRC granted an additional extension of time to respond to until March 6, 2015.

On March 6, 2015, the Custodian sought one (1) final extension of time to respond. The Custodian restated the difficulty in locating written correspondence responsive to the Complainant's request, in addition to responsive e-mails. Additionally, the Custodian stated he located the litigation file, and any responsive correspondence contained therein would be provided to the Complainant by no later than March 9, 2015.

On March 9, 2015, the Custodian provided the Complainant with those responsive records originally denied under the assumption that the Complainant had already possessed said records as part of a litigation process. On March 12, 2015, the GRC granted the Custodian a final extension of time until March 19, 2015. On March 19, 2015, the Custodian provided certified confirmation of compliance, stating that no additional correspondence between the Firm and the Board regarding the Complainant could be located. The Custodian also certified that all responsive correspondence discovered had been provided to the Complainant without redactions.

Therefore, the Custodian complied with the Council's January 30, 2015, Interim Order because he provided certified confirmation of compliance to the Executive Director in accordance with N.J. Court Rule 1:4-4 and submitted nine (9) redacted and unredacted copies of the requested records for an *in camera* review within the extended time allotted to respond.

Unlawful Denial of Access

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. N.J.S.A. 47:1A-6.

Personnel Records

N.J.S.A. 47:1A-10 provides that “the personnel or pension records of any individual in the possession of a public agency . . . shall not be considered a government record and shall not be made available for public access[.]” The statute goes on to list several exceptions to the personnel record proscription; to wit, “an individual’s name, title, position, salary, payroll record, length of service, date of separation and the reason therefor, and the amount and type of any pension received[.]” Id.

Attorney-Client Privilege

Additionally, OPRA exempts access to “any record within the attorney-client privilege.” N.J.S.A. 47:1A-1.1. Further, “[t]he provisions of [OPRA] shall not abrogate or erode any . . . grant of confidentiality . . . recognized by . . . court rule.” N.J.S.A. 47:1A-9(b). As such, OPRA does not allow for the disclosure of attorney work product, consisting of “the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.” Rule 4:10-2(c).

In the context of public entities, these privileges extend to communications between the public body, the attorney retained to represent it, necessary intermediaries and agents through whom communications are conveyed, and co-litigants who have employed a lawyer to act for them in a common interest. *See* Tractenberg v. Twp. of W. Orange, 416 N.J. Super. 354, 376 (App. Div. 2010); In re Env’tl. Ins. Actions, 259 N.J. Super. 308, 313 (App. Div. 1992). At the same time, the attorney-client and work product privileges do not apply to automatically and completely insulate attorney correspondence from disclosure. *See* Hunterdon Cnty. P.B.A. Local 188 v. Twp. of Franklin, 286 N.J. Super. 389, 394; In the Matter of Grand Jury Subpoenas, 241 N.J. Super. 18, 30 (App. Div. 1989).

Student Information

OPRA provides that its provisions “shall not abrogate any exemption of a public record or government record from public access heretofore made pursuant to [OPRA]; any other statute . . . regulation promulgated under the authority of any statute or Executive Order of the Governor . . .” N.J.S.A. 47: 1A-9(a).

The Family Educational Rights and Privacy Act (“FERPA”) provides that:

Each educational agency or institution shall maintain a record, kept with the

education records of each student Such record of access shall only be available to parents, the top school official and his assistants who are responsible for the custody of such records, and to persons or organizations authorized in, and under the conditions of, clauses (A) and (C) of paragraph (1) as a means of auditing the operation of the system.

20 U.S.C.A. § 1232g(b)(4(A)).

N.J.A.C. 6A:32-7.4 also provides that the “[t]he chief school administrator . . . shall be responsible for . . . assuring that access to [student] records is limited to authorized persons.”

In White v. Monmouth Reg’l High Sch., GRC Complaint No. 2012-218 (Interim Order dated September 24, 2013), the complainant sought closed minutes of board of education meetings. The custodian provided responsive records to the complainant, with redactions made to names and initials of parents and students. After *in camera* review, the Counsel held that such minimal redactions were proper, as they adhered to the disclosure restrictions set forth in FERPA, N.J.A.C. 6A:32-7.4, and N.J.S.A. 47:1A-10.

In the instant matter, the GRC conducted an *in camera* examination of the redacted and unredacted attorney bills. With few exceptions, the redactions consisted of the names and initials of students, parents, and employees. Those redactions identified as improper are listed in the table below.

Record Name/Date	Description of Record or Redaction	Custodian’s Explanation/ Citation for Non-disclosure or Redactions	Findings of the <i>In Camera</i> Examination
SSEC Billing Statement for services rendered through October 31, 2012 – general matters Page 2 Redaction 2	One word within the billing description.	Redacted under Attorney-client privilege. <u>N.J.S.A.</u> 47:1A-1.1.	The unredacted section does not contain attorney-client privileged information. The information is general enough that it does not reveal any legal advice, strategy, or work product. <u>N.J.S.A.</u> 47:1A-1.1. The Custodian must disclose this portion of the record.

SSEC Billing Statement for services rendered through November 30, 2012 – general matters Page 3 Redaction 4	Entire billing description.	Redacted under Attorney-client privilege. <u>N.J.S.A.</u> 47:1A-1.1.	The unredacted section does not contain attorney-client privileged information. The information is general enough that it does not reveal any legal advice, strategy, or work product. <u>N.J.S.A.</u> 47:1A-1.1. The Custodian must disclose this portion of the record.
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With the two exceptions listed in the table above, the Custodian properly made redactions on the basis of attorney-client privilege. Unlike in White, where the custodian redacted the name of a homeowner who had threatened to sue the Board of Education, the Custodian’s redactions here pertained to theories, mental impressions, and/or evaluation of liability of a variety of legal matters facing the Board. Such are valid reasons to redact pursuant to attorney-client privilege. N.J.S.A. 47:1A-1.1. *See also White*, GRC No. 2012-218 (*citing The Press of Atlantic City v. Ocean Cnty. Joint Ins. Fund*, 337 N.J. Super. 480, 487 (Law Div. 2000), and *In re Envtl. Ins. Actions*, 259 N.J. Super. at 317). Furthermore, because the Custodian certified that he provided without redactions all responsive correspondence between the Firm and Board regarding the Complainant, an *in camera* review of same was unnecessary.

The remaining redactions, in conformance with White, GRC No. 2012-218, were proper as set forth in the Custodian’s document index. There is no evidence in the record demonstrating that the Complainant is a person or organization authorized to receive student records otherwise exempt from disclosure pursuant to FERPA and N.J.A.C. 6A:32-7.1, *et seq.*

Furthermore, redacting the names and initials of school employees was also proper, as they pertained to grievances, disciplinary action, and/or complaints filed by or against employees of the Board. *See White*, GRC No. 2012-218, N.J.S.A. 47:1A-10.

Accordingly, the Custodian bore his burden of proving that he lawfully redacted the responsive attorney bills to protect the names and initials of parents, students, and employees. White, GRC No. 2012-218, N.J.A.C. 6A:32-7.1, *et seq.*, FERPA, and N.J.S.A. 47:1A-10.

Knowing & Willful

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

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian complied with the Council's January 30, 2015, Interim Order because he provided certified confirmation of compliance to the Executive Director in accordance with N.J. Court Rule 1:4-4 and submitted nine (9) redacted and unredacted copies of the requested records for an *in camera* review within the extended time allotted to respond.
2. With the two exceptions listed in the table above, the Custodian properly made redactions on the basis of attorney-client privilege. Unlike in White, where the custodian redacted the name of a homeowner who had threatened to sue the Board of Education, the Custodian's redactions here pertained to theories, mental impressions, and/or evaluation of liability of a variety of legal matters facing the Board. Such are valid reasons to redact pursuant to attorney-client privilege. N.J.S.A. 47:1A-1.1. *See also White v. Monmouth Reg'l High Sch.*, GRC Complaint No. 2012-218 (Interim Order dated September 24, 2013) (*citing The Press of Atlantic City v. Ocean Cnty. Joint Ins. Fund*, 337 N.J. Super. 480, 487 (Law Div. 2000), and In re Env'tl. Ins. Actions, 259 N.J. Super. 308, 313 (App. Div. 1992)). Furthermore, because the Custodian certified that he provided without redactions all responsive correspondence between the Firm and Lakewood Board of Education regarding the Complainant, an *in camera* review of same was unnecessary.
3. The Custodian bore his burden of proving that he lawfully redacted the responsive attorney bills to protect the names and initials of parents, students, and employees. White v. Monmouth Reg'l High Sch., GRC Complaint No. 2012-218 (Interim Order dated September 24, 2013), N.J.A.C. 6A:32-7.1, *et seq*; FERPA; and N.J.S.A. 47:1A-10.
4. **The Custodian shall comply with the Council's Findings of the *In Camera* Examination set forth in the above table within five (5) business days from receipt of this Order and simultaneously provide certified confirmation of compliance pursuant to N.J. Court Rule 1:4-4 to the Executive Director.⁸**
5. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Prepared By: Samuel A. Rosado
Staff Attorney
March 22, 2016

⁸ Satisfactory compliance requires that the Custodian deliver the records to the Complainant in the requested medium. If a copying or special service charge was incurred by the Custodian, the Custodian must certify that the record has been *made available* to the Complainant, but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Commissioner

INTERIM ORDER

January 30, 2015 Government Records Council Meeting

Michael I. Inzelbuch
Complainant

Complaint No. 2013-145

v.

Lakewood Board of Education (Ocean)
Custodian of Record

At the January 30, 2015 public meeting, the Government Records Council (“Council”) considered the January 20, 2015 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council, by a majority vote adopted the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian’s failure to respond in writing to the Complainant’s April 26, 2013, April 29, 2013 and May 1, 2013 OPRA requests either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order dated October 31, 2007). Furthermore, the Custodian’s failure to provide immediate access to the Complainant’s April 26, 2013 and April 29, 2013 OPRA requests seeking bills, payment vouchers, and contracts also results in a “deemed” denial. N.J.S.A., 47:1A-5(e). See Burdick, Jr. v. Twp. of Franklin (Hunterdon), GRC Complaint No. 2010-99 (Interim Order dated March 27, 2012); Carter v. Franklin Fire District No. 2 (Somerset), GRC Complaint Nos. 2011-124, 125, 126, 127 (Interim Order dated October 25, 2011); Wolosky v. Borough of Mount Arlington (Morris), GRC Complaint No. 2010-210 (Interim Order dated November 29, 2011). However, notwithstanding the Custodian’s “deemed denial,” the Council declines to order production of responsive records to Item Nos. 1-4 of the Complainant’s April 26, 2013 OPRA request, and Item Nos. 1-3 & 5-9, of the Complainant’s April 29, 2013 OPRA request, as the Custodian certified and provided evidence that responsive records to same were produced on or around June 26, 2013.
2. The GRC must conduct an *in camera* review of all redacted attorney billing statements to determine the validity of the Custodian’s assertion that these billing statements contain personnel material, attorney-client privileged material, and student information. See Paff v. NJ Dep’t of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005); N.J.S.A. 47:1A-10; N.J.S.A. 47:1A-1.1; and N.J.A.C. 6A:32-7.1, et seq.



3. The GRC must conduct an *in camera* review of responsive records withheld from disclosure as containing attorney-client privileged material to determine the validity of the Custodian's assertion that correspondence between the Firm and the Board regarding the Complainant are exempt from disclosure *in toto* for containing attorney-client privileged communications. See Paff v. NJ Dep't of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005); N.J.S.A. 47:1A-1.1.
4. The Custodian failed to prove his burden that he lawfully denied access to the responsive correspondence because the claim that the Complainant had previously obtained the records in relation to litigation is not a lawful basis for denial under OPRA. N.J.S.A. 47:1A-6; Caggiano v. Borough of Stanhope (Sussex), GRC Complaint No. 2005-211 (January 2006). Thus, the Custodian shall disclose the records.
5. Notwithstanding the Custodian's "deemed" denial, he did not unlawfully deny access to the requested e-mails as the request is invalid for failing to identify a specific subject or content matter. N.J.S.A. 47:1A-6; Elcavage v. West Milford Twp. (Passaic), GRC Complaint No. 2009-07 (April 2010); Sandoval v. NJ State Parole Bd., GRC Complaint No. 2006-167 (Interim Order dated March 28, 2007).
6. **The Custodian must deliver¹ to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see paragraphs 2 & 3 above), nine (9) copies of the redacted records, a document or redaction index², as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,³ that the records provided are the records requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**
7. **The Custodian shall comply with paragraph 4 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,⁴ to the Executive Director.⁵**
8. 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.

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

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

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

⁴ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

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

Interim Order Rendered by the
Government Records Council
On The 30th Day of January, 2015

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: February 3, 2015

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
January 30, 2015 Council Meeting**

**Michael I. Inzelbuch¹
Complainant**

GRC Complaint No. 2013-145

v.

**Lakewood Board of Education (Ocean)²
Custodial Agency**

Records Relevant to Complaint:

April 26, 2013 OPRA request: Inspection of:

1. [Schwartz, Simon, Edelstein & Celso, LLC, hereinafter “the Firm” or “Firm”] bills to review from OCTober [sic] 2012 to current[.]”
2. “[T]he resume, credentials, and resignation letter of Christopher Brick.”
3. “Any and all information as to the Agenda item as to TOK (Tree of Knowledge), to wit, the back up as to the program listed on the Agenda.”
4. “[Lakewood Board of Education, hereinafter “the Board” or “Board”] action notes (or whatever) available on the 2 [Office of Administrative Law]/litigation matters that were listed on the Agenda.”

April 29, 2013 OPRA request: Hardcopies of:

1. “Firm bills, payment vouchers and backup for the period of October 2012 to current (April 2013) . . . any and all contracts as to this Firm providing services to the Board . . . any and all documentation that the Board considered when hiring this Firm.”
2. “The resume, credentials and resignation letter of Asst. B. A. Christopher Brick.”
3. “Any and all information as to the Agenda item as to TOK (Tree of Knowledge), to wit, the back up as to the program listed on the Agenda of Thursday, April 25, 2013 (Page 9, Letters O and P – see attached.
 - a. “[I]nclude the [Request for Proposal hereinafter “RFP”], all responses to the RFP, and the source of funds.
 - b. “[A]ny and all e-mails/correspondence/documentation of the Business office including, but not limited, to the purchasing agent who notified [Tree of Knowledge] prior to the meeting that they were the successful bidder.”
 - c. “[T]he prior RFP (of this year) for same services and any and all documentation that would serve as the basis for the rejection of same.
 - d. “[T]ally sheets and/or review of proposals for same.”

¹ No legal representation listed on record.

² Represented by James Eric Andrews, Esq., of Schenck, Price, Smith & King, LLP (Florham Park, NJ).

4. “Any and all correspondence written by the Firm since April 2012 to present with regard to Michael I Inzulbuch, Esq.”
5. “Any and all correspondence written by the Firm to Bowman and Company and/or Jared Corn and/or received from same since April 2012 to present.”
6. “Any and all plans/reports/memos/documentation authored by the Board or its employees/consultants/agents since April 2012 with regard to transportation and the possible savings of monies including, but not limited, to a document from President [of the Board] Carl Fink, referenced to the [Ocean] County Superintendent.”
7. “Any and all financial reports provided to the [New Jersey Department of Education] and/or the [Ocean] County office since July 2012 to current as to the fiscal stability (or lack thereof) of the [Lakewood School District, hereinafter “the District” or “District”].”
8. “Any and all notices/correspondence/e-mails, etc., sent to any District staff that there is a spending freeze for the current school year and any and all documentation that would support the basis for said freeze.”
9. “The cv/resume/credentials for the district purchasing agent.”

May 1, 2013 OPRA request: Hardcopies of:

1. “Any and all Board approval(s) or notice to the Board with regard to [the Complainant] since April 2012 including but not limited to Lakewood Bd. v. Inzulbuch in Ocean County Superior Ct.”
2. “Any and all e-mails from Pres. Carl Fink to Laura Winters, Helen Tosia, or Business Office since April 2012.”

Custodian of Record: Thomas D’Ambola

Request Received by Custodian: April 29, 2013, May 1, 2013

Response Made by Custodian: April 29, 2013

GRC Complaint Received: May 21, 2013

Background³

Request and Response:

On April 26, 2013, the Complainant submitted an e-mail request citing the Open Public Records Act (“OPRA”) to the Custodian seeking the above-mentioned records. On April 29, 2013, the Custodian responded, in writing, advising that he was out of the office. The Custodian noted that the Complainant’s e-mail was not a proper OPRA request, but he would nonetheless respond within seven (7) business days.

On April 29, 2013, the Complainant submitted a second (2nd) OPRA request to the Custodian seeking the above-mentioned records.

³ The parties may have submitted additional correspondence or made additional statements/assertions in the submissions identified herein. However, the Council includes in the Findings and Recommendations of the Executive Director the submissions necessary and relevant for the adjudication of this complaint.

On May 1, 2013, the Complainant submitted a third (3rd) OPRA request to the Custodian seeking the above-mentioned records.

Denial of Access Complaint:

On May 21, 2013, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant stated that he submitted three (3) OPRA requests to the Custodian. The Complainant argued that the Custodian failed to respond to any of the submitted OPRA requests.

Statement of Information:

On June 6, 2013, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that he received the Complainant’s OPRA requests on April 29, 2013 and May 1, 2013. The Custodian further certified that did not respond to the Complainant’s OPRA requests because he was away from the office for an extended period of time shortly after receipt. The Custodian also stated that this complaint was filed prior to returning to work.

Additionally, the Custodian certified that responsive records were being provided to the Complainant as part of his SOI submission or under separate cover. The Custodian claimed that due to the varied nature of the requested records, several steps were taken to satisfy same. Specifically, the Custodian certified that he conducted a search of the District’s e-mail system and a review of files maintained throughout the District’s jurisdiction. The Custodian certified that responses to each request is as follows:

April 29, 2013 OPRA Request

1. Copies of the responsive bills are being provided with redactions of attorney-client privileged, student or personnel information. N.J.A.C. 6A:32-7.1 et seq. [“Family Education Rights and Privacy Act”] and N.J.S.A. 47:1A-10. The Custodian claimed to not understand the term “back up.” The Custodian further stated that “[i]t is not known what documentation, if any, individual Board members considered when hiring the [Firm].”
2. A copy of Mr. Brick’s resume and resignation letter is being provided with redactions to his contact information. Executive Order No. 26 (Gov. McGreevey, 2002) [hereinafter “EO 26”]; N.J.S.A. 47:1A-10.1.
3. “Copies of the proposals and RFP are being provided to the Complainant.” No other records exist.
4. “Correspondence from the Board attorney to Board is protected attorney/client communication not subject to disclosure under OPRA. N.J.S.A. 47:1A-1.1.” Further, “all other correspondence written by the law firm with respect to Complainant that was not sent to the Board or Board staff is in relation to the case of Lakewood BOE v. Inzelbuch, which correspondence Complainant has already been provided in connection with that litigation.”
5. A copy of one (1) responsive e-mail between Mr. Corn and Lisa Miller exists and is being provided to the Complainant.

6. “A copy of the presentation entitled ‘Savings Using LBOE Buses’ exists,” and “is being provided to Complainant.”
7. The Custodian stated that he is unsure what specific documents the Complainant seeks and claims there doesn’t appear to be any responsive record to the request as written. Notwithstanding, the Custodian stated that copies of reports from the Board Secretary to the Board and related internal documents evidencing the Board’s finances within the requested timeframe are being provided.
8. A copy of one (1) responsive e-mail from the Superintendent to staff exists and is being provided. The Custodian added that “[n]umerous other records regarding the District’s finances and procedures regarding District spending are available, but it is unclear what specific documents Complainant is seeking.”
9. A copy of the purchasing agent’s resume is being provided with redactions of contact information. EO 26; N.J.S.A. 47:1A-10.1.

May 1, 2013 OPRA Request

1. “It is unknown what Complainant means by “approvals” or “notice.” To the extent he means Board resolutions, none exist. To the extent he means correspondence from the Board’s attorneys to members of the Board and/or its administration, such records . . . are clearly protected and are not subjected to disclosure. N.J.S.A. 47:1A-1.1.”
2. “E-mails may exist. It is unclear as to who Complainant means by “Business Office.”” Notwithstanding, the Custodian argued that request was overly broad for failing to identify a specific subject matter. Burke v. Brandes, 429 N.J. Super. 169 (December 7, 2012) Bart v. Passaic Cnty. Pub. Hous. Agency, 406 N.J. Super. 445 (App. Div. 2009). Further, the Custodian contended that any “e-mails between Board President and senior administrative staff would contain inter-agency or intra-agency advisory, consultative, or deliberative material, as well as personnel and/or student information.” N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-10.1; N.J.A.C. 6A:32-7.1 *et seq.*

The Custodian then stated that the Complainant used to represent the Board. Further, the Custodian noted that upon being replaced in April 2012, the Complainant has filed a number of GRC complaints against the Board. The Custodian claimed that the number and content of the Complainant’s requests demonstrate that he is utilizing OPRA solely for the purpose of harassment.

Additional Submissions:

On November 14, 2013, the GRC asked the Complainant via e-mail to confirm whether he received responsive records to several items as certified to in the Custodian’s SOI. That same day, the Complainant responded via e-mail, stating “to the best of [his] knowledge” he has not received any responsive records.

On or around November 2014, the GRC asked the Custodian to submit proof that he produced any requested records to the Complainant as alluded to in his SOI. On December 1, 2014, the Custodian responded in writing, providing a letter to the Complainant dated June 26, 2013 by the Custodian’s former counsel. The correspondence indicated that copies of responsive

records to the Complainant's April 29, 2013 OPRA request were included therein. The correspondence also stated that the production included a log setting forth the legal rationale for redactions contained in the records.

On January 7, 2015, the Custodian's current counsel delivered a copy of the redaction log, detailing the reasons for redacting the attorney billing statements as responsive to Item No. 1 of the Complainant's April 26, 2013 and April 29, 2013 OPRA requests.

Analysis

Timeliness

OPRA mandates that a custodian must either grant or deny access to requested records within seven (7) business days from receipt of said request. N.J.S.A. 47:1A-5(i). A custodian's failure to respond within the required seven (7) business days results in a "deemed" denial. Id. Further, a custodian's response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5(g).⁴ Thus, a custodian's failure to respond in writing to a complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order dated October 31, 2007).

OPRA also states that:

Immediate access ordinarily shall be granted to budgets, *bills*, *vouchers*, *contracts*, including collective negotiations agreements and individual employment contracts, and public employee salary and overtime information.

N.J.S.A. 47:1A-5(e) (emphasis added).

The Custodian certified that the Complainant submitted his OPRA requests three (3) or more days prior to the Custodian taking a leave of absence from May 5, 2013, to May 20, 2013,⁵ and admitted that he did not respond to any of the Complainant's OPRA requests within seven (7) business days of receipt.

Additionally, the Complainant's April 26, 2013 and April 29, 2013 OPRA requests seeking bills, payment vouchers, and contracts between the law firm Schwartz, Simon, Edelstein and the Lakewood Board of Education ("Board") are "immediate access" records under OPRA. N.J.S.A. 47:1A-5(e). See Burdick, Jr. v. Twp. of Franklin (Hunterdon), GRC Complaint No. 2010-99 (Interim Order dated March 27, 2012) (attorney bills and invoices); Carter v. Franklin

⁴ A custodian's written response either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, even if said response is not on the agency's official OPRA request form, is a valid response pursuant to OPRA.

⁵ While the Council does not question the Custodian's justification for his leave of absence, best practices dictates that if a custodian is to be unavailable for an extended amount of time, another employee should be designated to accept and respond to OPRA requests in his/her stead for the duration of his/her absence.

Fire District No. 2 (Somerset), GRC Complaint Nos. 2011-124, 125, 126, 127 (Interim Order dated October 25, 2011) (payment vouchers); Wolosky v. Borough of Mount Arlington (Morris), GRC Complaint No. 2010-210 (Interim Order dated November 29, 2011) (contracts). There is no evidence in the record demonstrating that the Custodian produced said records immediately to the Custodian.

The Custodian's failure to respond in writing to the Complainant's April 26, 2013, April 29, 2013 and May 1, 2013 OPRA requests either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley, GRC No. 2007-11. Furthermore, the Custodian's failure to provide immediate access to the Complainant's April 26, 2013 and April 29, 2013 OPRA requests seeking bills, payment vouchers, and contracts also results in a "deemed" denial. N.J.S.A. 47:1A-5(e). See Burdick, Jr., GRC No. 2010-99; Carter, GRC Nos. 2011-124, 125, 126, 127; Wolosky, GRC No. 2010-210. However, notwithstanding the Custodian's "deemed denial," the Council declines to order production of responsive records to Item Nos. 1-4 of the Complainant's April 26, 2013 OPRA request, and Item Nos. 1-3 & 5-9, of the Complainant's April 29, 2013 OPRA request, as the Custodian certified, and the record demonstrates, that responsive records to same were produced on or around June 26, 2013.

Unlawful Denial of Access

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.

April 26, 2013 OPRA Request Item No. 1 & April 29, 2013 OPRA Request Item No. 1

Firm Bills and Invoices

In Paff v. NJ Dep't of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005), the complainant appealed a final decision of the GRC⁶ 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.

Id. at 354.

⁶ Paff v. NJ Dep't of Labor, Bd. of Review, GRC Complaint No. 2003-128 (October 2005).

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.

Id. at 355.

Further, the court stated that:

[w]e hold only that the GRC has and should exercise its discretion to conduct *in camera* review when necessary to resolution of the appeal . . . There is no reason for concern about unauthorized disclosure of exempt documents or privileged information as a result of *in camera* review by the GRC. The GRC's obligation to maintain confidentiality and avoid disclosure of exempt material is implicit in N.J.S.A. 47:1A-7f, which provides for closed meeting when necessary to avoid disclosure before resolution of a contested claim of exemption.

Id.

Here, the Custodian certified in the SOI that he provided the Complainant with redacted copies of the requested attorney bills. The Custodian asserted that the various bills were redacted as containing personnel matters under N.J.S.A. 47:1A-10, attorney-client privileged communications N.J.S.A. 47:1A-1.1, and/or student information under N.J.A.C. 6A:32-7.1, *et seq.*

The GRC must therefore conduct an *in camera* review of all redacted attorney billing statements to determine the validity of the Custodian's assertion that these billing statements contain personnel material, attorney-client privileged material, and student information. *See Paff*, 379 N.J. Super. at 346; N.J.S.A. 47:1A-10; N.J.S.A. 47:1A-1.1; and N.J.A.C. 6A:32-7.1, *et seq.*

April 29, 2013 OPRA Request Item No. 4

Records Withheld Under Attorney-Client Privilege

As stated above, *Paff*, 379 N.J. Super. at 346 provides that the GRC may conduct an *in camera* review to determine the validity of an asserted exemption. In the SOI, the Custodian contended that responsive correspondence from the Firm to the Board regarding the complainant

from April 2012 to current would not be subject to disclosure under OPRA as containing attorney-client privileged material. N.J.S.A. 47:1A-1.1.

Therefore, the GRC must conduct an *in camera* review of responsive records withheld from disclosure as containing attorney-client privileged material to determine the validity of the Custodian's assertion that correspondence between the Firm and the Board regarding the Complainant are exempt from disclosure *in toto* for containing attorney-client privileged communications. See Paff, 379 N.J. Super. at 346; N.J.S.A. 47:1A-1.1.

Records Already Provided In Connection With Litigation

OPRA provides that:

[i]f the custodian is unable to comply with a request for access, the custodian shall indicate the specific basis therefor on the request form and promptly return it to the requestor. The custodian shall sign and date the form and provide the requestor with a copy thereof[.]

N.J.S.A. 47:1A-5(g).

In the instant matter, the Custodian responded to the Complainant's April 29, 2013 request Item No. 4 in part by stating that the Complainant should already possess correspondence written by the Firm pertaining to the Complainant. The Custodian claimed that such correspondence has already been provided to the Complainant in relation to the litigation matter "Lakewood BOE v. Inzelbuch."

In Caggiano v. Borough of Stanhope (Sussex), GRC Complaint No. 2005-211 (January 2006), the complainant filed numerous OPRA requests for the same records in each request. The custodian responded to the complainant stating that the records were previously provided to the complainant in 2002 and 2003 on repeated occasions. The Council held that "the fact that the records were previously provided to the Complainant on several occasions is not a lawful basis to deny access to the records requests."

The Custodian failed to prove his burden that he lawfully denied access to the responsive correspondence because the claim that the Complainant had previously obtained the records in relation to litigation is not a lawful basis for denial under OPRA. N.J.S.A. 47:1A-6; Caggiano, GRC No. 2005-211. Thus, the Custodian shall disclose the records.

Invalid Request

May 1, 2013 OPRA Request Item No. 2

The New Jersey Appellate Division has held that:

While OPRA provides an alternative means of access to government documents not otherwise exempted from its reach, *it is not intended as a research tool*

litigants may use to force government officials to identify and siphon useful information. Rather, OPRA simply operates to make identifiable government records “readily accessible for inspection, copying, or examination.” N.J.S.A. 47:1A-1.

MAG Entm’t, LLC v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005) (emphasis added).

Moreover, the test under MAG is whether a requested record is a specifically identifiable government record. If it is, the record is disclosable barring any exemptions to disclosure contained in OPRA. The Council established criteria deemed necessary to specifically identify an e-mail communication in Sandoval v. NJ State Parole Bd., GRC Complaint No. 2006-167 (Interim Order dated March 28, 2007). In Sandoval, the complainant requested “e-mail . . . between [two individuals] from April 1, 2005 through June 23, 2006 [using seventeen (17) different keywords].” The custodian denied the request, claiming that it was overly broad. The Council held that “[t]he Complainant in the complaint now before the GRC requested specific e-mails *by recipient, by date range and by content*. Based on that information, the Custodian has identified [numerous] e-mails which fit the specific recipient and date range criteria Complainant requested.” Id. at 16 (emphasis added).

In Elcavage v. West Milford Twp. (Passaic), GRC Complaint No. 2009-07 (April 2010), the Council examined what constitutes a valid request for e-mails under OPRA. The Council determined that:

In accord with MAG, supra, and its progeny, in order to specifically identify an e-mail, OPRA requests must contain (1) the content and/or subject of the e-mail, (2) the specific date or range of dates during which the e-mail was transmitted or the e-mails were transmitted, and (3) a valid e-mail request must identify the sender and/or the recipient thereof.

Id. at 5 (emphasis in original).

Here, the Complainant requested “any and all e-mails sent by Pres. Carl Fink to Laura Winters, Helen Tobia, or Business Office since April 2012.” While the request identified the sender/recipient(s) and date range, the request failed to identify a specific subject matter or content within the requested e-mails. See Elcavage, GRC No. 2009-07, and Sandoval, GRC No. 2006-167.

Therefore, notwithstanding the Custodian’s “deemed” denial, he did not unlawfully deny access to the requested e-mails as the request is invalid for failing to identify a specific subject or content matter. N.J.S.A. 47:1A-6; Elcavage, GRC No. 2009-07; Sandoval, GRC No. 2006-167.

Knowing & Willful

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

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian's failure to respond in writing to the Complainant's April 26, 2013, April 29, 2013 and May 1, 2013 OPRA requests either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order dated October 31, 2007). Furthermore, the Custodian's failure to provide immediate access to the Complainant's April 26, 2013 and April 29, 2013 OPRA requests seeking bills, payment vouchers, and contracts also results in a "deemed" denial. N.J.S.A. 47:1A-5(e). See Burdick, Jr. v. Twp. of Franklin (Hunterdon), GRC Complaint No. 2010-99 (Interim Order dated March 27, 2012); Carter v. Franklin Fire District No. 2 (Somerset), GRC Complaint Nos. 2011-124, 125, 126, 127 (Interim Order dated October 25, 2011); Wolosky v. Borough of Mount Arlington (Morris), GRC Complaint No. 2010-210 (Interim Order dated November 29, 2011). However, notwithstanding the Custodian's "deemed denial," the Council declines to order production of responsive records to Item Nos. 1-4 of the Complainant's April 26, 2013 OPRA request, and Item Nos. 1-3 & 5-9, of the Complainant's April 29, 2013 OPRA request, as the Custodian certified and provided evidence that responsive records to same were produced on or around June 26, 2013.
2. The GRC must conduct an *in camera* review of all redacted attorney billing statements to determine the validity of the Custodian's assertion that these billing statements contain personnel material, attorney-client privileged material, and student information. See Paff v. NJ Dep't of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005); N.J.S.A. 47:1A-10; N.J.S.A. 47:1A-1.1; and N.J.A.C. 6A:32-7.1, *et seq.*
3. The GRC must conduct an *in camera* review of responsive records withheld from disclosure as containing attorney-client privileged material to determine the validity of the Custodian's assertion that correspondence between the Firm and the Board regarding the Complainant are exempt from disclosure *in toto* for containing attorney-client privileged communications. See Paff v. NJ Dep't of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005); N.J.S.A. 47:1A-1.1.
4. The Custodian failed to prove his burden that he lawfully denied access to the responsive correspondence because the claim that the Complainant had previously obtained the records in relation to litigation is not a lawful basis for denial under

OPRA. N.J.S.A. 47:1A-6; Caggiano v. Borough of Stanhope (Sussex), GRC Complaint No. 2005-211 (January 2006). Thus, the Custodian shall disclose the records.

5. Notwithstanding the Custodian's "deemed" denial, he did not unlawfully deny access to the requested e-mails as the request is invalid for failing to identify a specific subject or content matter. N.J.S.A. 47:1A-6; Elcavage v. West Milford Twp. (Passaic), GRC Complaint No. 2009-07 (April 2010); Sandoval v. NJ State Parole Bd., GRC Complaint No. 2006-167 (Interim Order dated March 28, 2007).
6. **The Custodian must deliver⁷ to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see paragraphs 2 & 3 above), nine (9) copies of the redacted records, a document or redaction index⁸, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,⁹ that the records provided are the records requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**
7. **The Custodian shall comply with paragraph 4 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,¹⁰ to the Executive Director.¹¹**
8. 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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Staff Attorney

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

January 20, 2015

⁷ The *in camera* records 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.

⁸ The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

⁹ "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."

¹⁰ "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."

¹¹ Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.