



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

PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

July 30, 2019 Government Records Council Meeting

Sacha Pouliot
Complainant

Complaint No. 2015-281

v.

NJ Department of Education
Custodian of Record

At the July 30, 2019 public meeting, the Government Records Council (“Council”) considered the July 23, 2019 Supplemental 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. Because the parties failed to reach a fee agreement, and because the Complainant’s Counsel subsequently submitted a timely fee application, the Council shall determine the reasonable amount of attorney’s fees to which the Complainant is entitled.
2. The Council finds that 5.9 hours at cumulative hourly rate of \$211.69 per hour is reasonable for the work performed in the instant matter. **Accordingly, the Council Staff recommends that the Council award fees to Complainant’s Counsel in the amount of \$1,249.00, representing 5.9 hours of service at \$211.69 per hour.**
3. Counsel did not request a lodestar adjustment; thus, no enhancement should be awarded.

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 30th Day of July 2019

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: August 2, 2019

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

Prevailing Party Attorney's Fees
**Supplemental Findings and Recommendations of the Council Staff
July 30, 2019 Council Meeting**

**Sacha Pouliot¹
Complainant**

GRC Complaint No. 2015-281

v.

**New Jersey Department of Education²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of:

1. All e-mails between Elaine Lerner, Coordinator with the Office of Special Education Programs (“SEP”), and Peggy McDonald, Director of the SEP, between September 1, 2013, and June 12, 2015, regarding the conditional approval status of the Learning Center for Exceptional Children (“LCEC”).
2. All e-mails between Linda Chavez, Supervisor of the Child Study Passaic County, and Ms. McDonald, between September 1, 2013, and June 12, 2015, regarding the conditional approval status of the LCEC.

Custodian of Record: Tara Rider³

Request Received by Custodian: June 12, 2015

Response Made by Custodian: June 23, 2015

GRC Complaint Received: September 3, 2015

Background

February 26, 2019 Council Meeting:

At its February 26, 2019 public meeting, the Council considered the February 19, 2019 Supplemental Findings and Recommendations of the Council Staff and all related documentation submitted by the parties. The Council, by a majority vote, adopted said findings and recommendations. The Council, therefore, found that:

1. The current Custodian complied with the Council’s October 30, 2018 Interim Order because she responded in the extended time frame fully complying with the Council’s

¹ Represented by Vito A. Gagliardi, Esq., of Porzio, Bromberg, & Newman, P.C. (Morristown, NJ).

² Represented by Deputy Attorney General Kathryn Duran as of November 12, 2018. Previously represented by Deputy Attorney General Beth N. Shore.

³ The current Custodian of Record is Jennifer Simons. The original Custodian of Record was Donna Fletcher-Lugo.

In Camera Examination Findings. The current Custodian also simultaneously provided certified confirmation of compliance to the Council Staff.

2. Although the original Custodian unlawfully denied access to portions of the responsive e-mails, she lawfully denied access to other portions. Further, the Custodian properly complied with the Council's January 31, 2017 Interim Order and the current Custodian complied with the Council's June 26, and October 30, 2018 Interim Orders. Additionally, the evidence of record does not indicate that the original Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the original Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.
3. Pursuant to the Council's June 26, and October 30, 2018 Interim Orders, the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006). Additionally, a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Specifically, the Council required records to be disclosed in accordance with its *In Camera* Examination Findings, which the current Custodian complied with on November 16, 2018. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. 432, and Mason, 196 N.J. 51. **Based on this determination, the parties shall confer in an effort to decide the amount of reasonable attorney's fees to be paid to Complainant within twenty (20) business days. The parties shall promptly notify the GRC in writing if a fee agreement is reached. If the parties cannot agree on the amount of attorney's fees, Complainant's Counsel shall submit a fee application to the Council in accordance with N.J.A.C. 5:105-2.13.**

Procedural History:

On February 28, 2019, the Council distributed its Interim Order to all parties. On March 29, 2019, the Government Records Council ("GRC") advised the parties that the fee agreement time frame expired. The GRC further advised that the Complainant's Counsel had twenty (20) business days to submit a fee application.

On April 24, 2019, the Complainant's Counsel submitted a fee application. On May 6, 2019, Custodian's Counsel sought an extension of time until May 15, 2019 to submit objections. On May 7, 2019, the GRC granted the requested extension. On May 10, 2019, Custodian's Counsel submitted objections to the fee application.

Analysis

Compliance

At its February 26, 2019 meeting, the Council ordered the parties to “confer in an effort to decide the amount of reasonable attorney’s fees” and notify the GRC of any fee agreement. Further, the Council ordered that, should the parties not reach an agreement, the Complainant’s Counsel “shall submit a fee application . . . in accordance with N.J.A.C. 5:105-2.13.” On February 28, 2019, the Council distributed its Interim Order to all parties, providing the parties twenty (20) business days to reach a fee agreement. Thus, the parties were required to notify the GRC of any agreement by March 28, 2019.

On March 29, 2019, following the expiration of the time frame to reach a settlement, the GRC advised the parties that Complainant’s Counsel had twenty (20) business days to submit a fee application in accordance with N.J.A.C. 5:105-2.13. On April 24, 2019, the eighteenth (18th) business day after the GRC notified the parties that the settlement time frame expired, Complainant’s Counsel submitted his fee application.

Therefore, because the parties failed to reach a fee agreement, and because the Complainant’s Counsel subsequently submitted a timely fee application, the Council shall determine the reasonable amount of attorney’s fees to which the Complainant is entitled.

Prevailing Party Attorney Fee Award

“Under the American Rule, adhered to by the . . . courts of this state, the prevailing litigant is ordinarily not entitled to collect a reasonable attorney’s fee from the loser.” Rendine v. Pantzer, 141 N.J. 292, 322 (1995) (internal quotation marks omitted). However, this principle is not without exception. New Jerseyans for a Death Penalty Moratorium v. N.J. Dep’t of Corrections, (“NJMDP”) 185 N.J. 137, 152 (2005). Some statutes, such as OPRA, incorporate a “fee-shifting measure: to ensure ‘that plaintiffs with bona fide claims are able to find lawyers to represent them[,] . . . to attract competent counsel in cases involving statutory rights, . . . and to ensure justice for all citizens.’” Id. at 153 (quoting Coleman v. Fiore Bros., 113 N.J. 594, 598, (1989)).

OPRA provides that “government records shall be readily accessible for inspection, copying, or examination by the citizens of this State.” Id. at 152 (citing N.J.S.A. 47:1A-1). OPRA further provides that:

A person who is denied access to a government record by the custodian of the record, at the option of the requestor, may: institute a proceeding to challenge the custodian's decision by filing an action in Superior Court . . . ; or in lieu of filing an action in Superior Court, file a complaint with the Government Records Council A requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee.

N.J.S.A. 47:1A-6. See generally NJDPM, 185 N.J. at 137 (“By making the custodian of the government record responsible for the payment of counsel fees to a prevailing requestor, the

Legislature intended to even the fight.” Id. at 153. (quoting Courier News v. Hunterdon Cnty. Prosecutor’s Office, 378 N.J. Super. 539, 546 (App. Div. 2005)).

In the instant matter, the Council determined that the Complainant achieved “the desired result because the complaint brought about a change (voluntary or otherwise) in the [C]ustodian’s conduct.” Teeters, 387 N.J. Super. at 432. Further, the Council found that a factual causal nexus existed between the Complainant’s filing of a Denial of Access Complaint and the relief ultimately achieved. Mason, 196 N.J. at 73. Accordingly, the Council ruled that the Complainant was a prevailing party entitled to an award of a reasonable attorney’s fee and ordered the parties to cooperate in an effort to reach an agreement on fees. Absent the parties’ ability to reach an agreement, the Council provided the Complainant’s Counsel an opportunity to file an application for fees.

A. Standards for Fee Award

The starting “‘point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate,’ a calculation known as the lodestar.” Rendine, 141 N.J. at 324 (quoting Hensley v. Eckerhart, 461 U.S. 424, 434 (1983)). Hours, however, are not reasonably expended if they are excessive, redundant, or otherwise unnecessary. Hensley, 461 U.S. at 434. When determining the reasonableness of the hourly rate charged, the GRC should consider rates for similar services by lawyers of reasonably comparable experience, skill, and reputation in the same geographical area. Walker v. Giuffre, 415 N.J. Super. 597, 606 (App. Div. 2010) (quoting Rendine, 141 N.J. at 337). However, the fee-shifting statutes do not contemplate payment for the learning experience of attorneys for the prevailing party. HIP (Heightened Independence and Progress, Inc.) v. K. Hovnanian at Mahwah VI, Inc., 291 N.J. Super. 144, 160 (citing Council Entm’t, Inc. v. Atlantic City, 200 N.J. Super. 431, 441-42 (Law Div. 1984)).

Additionally, the NJDPM Court cautioned that “unusual circumstances may occasionally justify an upward adjustment of the lodestar” but further cautioned that “[o]rdinarily[] the facts of an OPRA case will not warrant an enhancement of the lodestar amount because the economic risk in securing access to a particular government record will be minimal. For example, in a ‘garden variety’ OPRA matter . . . enhancement will likely be inappropriate.” Id. at 157. OPRA neither mandates nor prohibits enhancements. NJDPM, 185 N.J. at 157. However, “[b]ecause enhancements are not preordained . . . [they] should not be made as a matter of course.” Ibid. The lodestar enhancement may be adjusted, either upward or downward, depending on the degree of success achieved. Id. at 153-55. “[T]he critical factor in adjusting the lodestar is the degree of success obtained.” Id. at 154 (quoting Silva v. Autos of Amboy, Inc., 267 N.J. Super. 546, 556 (App. Div. 1993) (quoting Hensley, 461 U.S. at 435)). If “a plaintiff has achieved only partial or limited success . . . the product of hours reasonably expended on the litigation . . . times a reasonable hourly rate may be an excessive amount.” NJDPM, 185 N.J. at 153 (quoting Szczepanski v. Newcomb Med. Ctr., 141 N.J. 346, 355 (1995) (internal quotation marks omitted)). Conversely, “[w]here a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee.” NJDPM, 185 N.J. at 154 (quoting Hensley, 461 U.S. at 435).

Moreover, in all cases, an attorney's fee must be reasonable when interpreted in light of the Rules of Professional Conduct. For instance, in Rivera v. Bergen Cnty. Prosecutor's Office, 2012 N.J. Super. Unpub. LEXIS 2752 (December 11, 2012) (citing Furst v. Einstein Moomjy, Inc., 182 N.J. 1, 21-22 (2004)), the trial court stated that:

To verify the reasonableness of a fee, courts must address: 1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly; 2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer; 3) the fee customarily charged in the locality for similar legal services; 4) the amount involved and the results obtained; 5) the time limitations imposed by the client or by the circumstances; 6) the nature and length of the professional relationship with the client; 7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and 8) whether the fee is fixed or contingent.

[Rivera, 2012 N.J. Super. Unpub. LEXIS 2752, at 11 (applying R.P.C. 1.5(a).)]

In addition, N.J.A.C. 5:105-2.13 sets forth the information that counsel must provide in his or her application seeking fees in an OPRA matter. Providing the requisite information required by its regulations permits the Council to analyze the reasonableness of the requested fee.

Finally, the Court has noted that “[i]n fixing fees against a governmental entity, the judge must appreciate . . . that ‘the cost is ultimately borne by the public’ and that ‘the Legislature . . . intended that the fees awarded serve the public interest as it pertains to those individuals who require redress in the context of a recognition that limited public funds are available for such purposes.’” HIP, 291 N.J. Super. at 167 (quoting Furey v. Cnty. of Ocean, 287 N.J. Super. 42, 46 (App. Div. 1996)).

B. Evaluation of Fee Application

1. Lodestar Analysis

a. Hourly Rate

In the instant matter, Counsel is seeking a fee award of \$1,249.00, representing 5.9 hours at varied hourly rates ranging from \$135.00 to \$520.00 as follows:

- Complainant's Counsel:
 - Principal member of his firm, which he has been with for 19 years.
 - Licensed in New Jersey since 1989.
 - \$475.00 to \$520.00 per hour.
- Deborah H. Share, Esq.:
 - Associate member with Counsel's firm.
 - Licensed in New Jersey since 2013.
 - \$280.00 per hour.

- Jennifer Ciaburri:
 - Paralegal member with Counsel’s firm, which she has been with since 2000.
 - Master’s Degree in Legal Studies and an American Bar Association approved paralegal certification.
 - \$135.00 to \$205.00 per hour.

- Kathy Mulch:
 - Document Clerk with Counsel’s firm since 2006.
 - \$135.00 to \$205.00 per hour.

In support of this hourly rate, Counsel certified that the rates above were reflected in the Complainant’s retainer agreement. Counsel Certif. at ¶ 6. Also, Counsel affirmed that, given his and the others’ level of experience, the rates were commensurate with “similar legal services in the Morris County, New Jersey area.” Id. at ¶ 7.

In her objections, Custodian’s Counsel argued that Complainant’s Counsel failed to bear his burden that the billed hourly rates were “fair, realistic, and accurate[.]” Walker v. Giuffre, 209 N.J. 124, 132 (2012). Counsel argued that fee shifting provisions do not contemplate a normal billing rate, but rather a rate that an average attorney would bill. Id. at 132-133 (quoting Singer v. State, 95 N.J. 487, 500-501 (1984)). Counsel cited to several cases where New Jersey courts held much lower hourly rates in OPRA cases. See e.g. Parsons Infrastructure & Envtl. Grp., Inc. v. State, 2018 N.J. Super. Unpub LEXIS 432, 17-18 (App. Div. 2018). Counsel also noted that the GRC found much lower rates than those proposed by Complainant’s Counsel. See e.g. Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2011-76 (June 2015). Counsel contended that Complainant’s Counsel attempted to support his suggested rates for himself, Ms. Share, Ms. Ciaburri, and Ms. Mulch with little more than a blanket statement that the rates were commensurate with Morris County fee rates. Counsel suggested that the appropriate rates for an OPRA complaint were \$350.00 per hour for a partner, \$250.00 for someone with Ms. Share’s experience, and \$150.00 for paralegal work. Counsel also argued that fees for organizing files and updating indices should not be passed on to the New Jersey Department of Education.

In reaching a determination on the reasonableness of the hourly rate, the GRC “should consider rates for similar services by lawyers of reasonably comparable experience, skill, and reputation in the same geographical area.” Walker, 415 N.J. Super. at 606. Further, the GRC must consider whether Counsel bore his burden of proof that the billed hourly rates were “fair, realistic, and accurate[.]” Walker, 209 N.J. at 132. To this end, Complainant’s Counsel provides a certified description of experience for each member, as well as a generalized statement regarding commensurate charges in the relevant geographical area. Custodian’s Counsel argued that neither statement provided enough support for the suggested rates. Counsel also noted that most OPRA litigation before the courts and GRC resulted in an hourly rate range of \$300.00 to \$350.00.

After significant contemplation, the GRC is persuaded that Complainant Counsel’s rates are reasonable for the following reasons. The GRC first agrees with Custodian’s Counsel that Complainant Counsel’s statements regarding the hourly rate are broad to the point that it is difficult to ascertain whether same are reasonable. Also, Custodian’s Counsel rightly notes that precedential OPRA litigation has resulted in fee ranges significantly less than Complainant Counsel’s \$475.00

to \$520.00. This is even when compared with attorneys who have significant OPRA experience. See *i.e.* Carter v. Franklin Fire Dist. No. 2 (Somerset), GRC Complaint No. 2011-382 (December 2014); Stern v. Lakewood Volunteer Fire Dep't, Inc., 2016 N.J. Super. Unpub. LEXIS 2612 (App. Div. 2016); Parsons, 2018 N.J. Super. Unpub. LEXIS 432.

However, the fee application here is distinctly different from any the GRC received before in that Complainant's Counsel utilized a much lesser charge for Ms. Ciaburri for most of the time spent on this complaint. Thus, when calculating the cumulative overall fee (\$1,249.00) at the estimated number of hours (5.9), the rate falls dramatically to \$211.69 per hour. Such a rate is well below the typical award for OPRA matters where an attorney is solely charging his or her rate to perform the work necessary for a complaint. Thus, the GRC believes that, notwithstanding the individualized rates advanced by Complainant's Counsel, the cumulative hourly rate of \$211.69 is reasonable and will be relied upon for a total calculation.

Based on the foregoing, the cumulative rate of \$211.69 is very reasonable for a practitioner with Counsel's experience and skill level in this geographical area.

b. Time Expended

In support of his request for fees, Complainant's Counsel submitted a log of his time. For the period from August 4, 2015 through November 16, 2018, Counsel billed a total of 5.9 hours for work on this complaint. The performed tasks included preparing the Denial of Access Complaint, addressing the Statement of Information, seeking status updates, exchanging e-mails with the parties, and physical file management.

In accordance with the mandates of N.J.A.C. 105-2.13(b), Counsel's time sheet provided detailed descriptions of the exact work performed in the required tenths of an hour. N.J.A.C. 105-2.13(b)(5). The bill itself is broken down by date, staff member conducting work, task performed, number of hours, and total amount. The bill also includes a fee summary breaking down the number of hours expended by each staff member, the hourly rate, and total fee.

In her objections, Custodian's Counsel argued that the overall lodestar should be reduced due to limited success in this complaint. NJDPM, 185 N.J. at 154. Custodian's Counsel noted that the GRC found 148 of the 155 e-mails at issue here to be exempt from disclosure. Counsel further argued that the ordered disclosure comprised of e-mails already in the Complainant's possession or containing common information.

Custodian's Counsel also argued that the total hours should be reduced because they were unreasonable. Counsel contended that, as an example, Complainant's Counsel charged 1.5 hours to draft and file the Denial of Access Complaint. Counsel argued that the complaint did not include a legal brief and did not provide complex amounts of detail. Counsel thusly contended that Complainant's Counsel should be awarded \$150.00 equal to one (1) hour for the time Ms. Ciaburri took to draft and file the complaint at her hourly rate.

The review of an application for fees, by necessity, must be conducted on a case-by-case basis. The Council finds that Counsel's fee application mostly conforms to the requirements of

N.J.A.C. 1:105-2.13(b) and provides the Council with enough detailed information for a proper analysis to be conducted.

The GRC finds that the accounting of charges is reasonable. There are no entries present in the time sheet warranting a reduction in time. Each task is reasonably detailed with the corresponding amount of time necessary to conduct same. The GRC is not persuaded by Custodian Counsel's arguments that the hours should be reduced. A review of the Denial of Access Complaint reveals that it is more detailed than argued by Custodian's Counsel. The absence of a legal brief from Complainant's Counsel does not change this fact. Also, there is no issue with the support staff cost, as it is contemplated as part of a prevailing party application in the GRC's regulations. N.J.A.C. 5:105-2.13(b)(4).

Finally, the GRC is not persuaded by Custodian Counsel's argument that the fee should be reduced due to limited success in the instant complaint. While the Council found that majority of the e-mail bodies were exempt, it ordered all records to be disclosed with redactions. The header and salutation information disclosed, while benign to Custodian's Counsel, was nonetheless part of the public record that was unlawfully denied. Thus, the GRC does not agree that the Council's decision was so limited that the requested fee should be reduced.

Accordingly, the Council finds that 5.9 hours at cumulative hourly rate of \$211.69 per hour is reasonable for the work performed in the instant matter. **Accordingly, the Council Staff recommends that the Council award fees to Complainant's Counsel in the amount of \$1,249.00, representing 5.9 hours of service at \$211.69 per hour.**

2. Enhancement Analysis

Counsel did not request a lodestar adjustment; thus, no enhancement should be awarded.

Conclusions and Recommendations

The Council Staff respectfully recommends the Council find that:

1. Because the parties failed to reach a fee agreement, and because the Complainant's Counsel subsequently submitted a timely fee application, the Council shall determine the reasonable amount of attorney's fees to which the Complainant is entitled.
2. The Council finds that 5.9 hours at cumulative hourly rate of \$211.69 per hour is reasonable for the work performed in the instant matter. **Accordingly, the Council Staff recommends that the Council award fees to Complainant's Counsel in the amount of \$1,249.00, representing 5.9 hours of service at \$211.69 per hour.**
3. Counsel did not request a lodestar adjustment; thus, no enhancement should be awarded.

Prepared By: Frank F. Caruso
Acting Executive Director

July 23, 2019



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

PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

INTERIM ORDER

February 26, 2019 Government Records Council Meeting

Sacha Pouliot
Complainant

Complaint No. 2015-281

v.

NJ Department of Education
Custodian of Record

At the February 26, 2019 public meeting, the Government Records Council (“Council”) considered the December 11, 2018 Supplemental Findings and Recommendations of the Council Staff 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 current Custodian complied with the Council’s October 30, 2018 Interim Order because she responded in the extended time frame fully complying with the Council’s *In Camera* Examination Findings. The current Custodian also simultaneously provided certified confirmation of compliance to the Council Staff.
2. Although the original Custodian unlawfully denied access to portions of the responsive e-mails, she lawfully denied access to other portions. Further, the Custodian properly complied with the Council’s January 31, 2017 Interim Order and the current Custodian complied with the Council’s June 26, and October 30, 2018 Interim Orders. Additionally, the evidence of record does not indicate that the original Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the original Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.
3. Pursuant to the Council’s June 26, and October 30, 2018 Interim Orders, the Complainant has achieved “the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian’s conduct.” Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006). Additionally, a factual causal nexus exists between the Complainant’s filing of a Denial of Access Complaint and the relief ultimately achieved. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Specifically, the Council required records to be disclosed in accordance with its *In Camera* Examination Findings, which the current Custodian complied with on November 16, 2018. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney’s fee. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. 432, and Mason, 196



N.J. 51. Based on this determination, the parties shall confer in an effort to decide the amount of reasonable attorney's fees to be paid to Complainant within twenty (20) business days. The parties shall promptly notify the GRC in writing if a fee agreement is reached. If the parties cannot agree on the amount of attorney's fees, Complainant's Counsel shall submit a fee application to the Council in accordance with N.J.A.C. 5:105-2.13.

Interim Order Rendered by the
Government Records Council
On The 26th Day of February, 2019



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 28, 2019

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Council Staff
February 26, 2019 Council Meeting**

**Sacha Pouliot¹
Complainant**

GRC Complaint No. 2015-281

v.

**New Jersey Department of Education²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of:

1. All e-mails between Elaine Lerner, Coordinator with the Office of Special Education Programs (“SEP”), and Peggy McDonald, Director of the SEP, between September 1, 2013, and June 12, 2015, regarding the conditional approval status of the Learning Center for Exceptional Children (“LCEC”).
2. All e-mails between Linda Chavez, Supervisor of the Child Study Passaic County, and Ms. McDonald, between September 1, 2013, and June 12, 2015, regarding the conditional approval status of the LCEC.

Custodian of Record: Tara Rider³
Request Received by Custodian: June 12, 2015
Response Made by Custodian: June 23, 2015
GRC Complaint Received: September 3, 2015

Background

October 30, 2018 Council Meeting:

At its October 30, 2018 public meeting, the Council considered the October 27, 2018 Supplemental Findings and Recommendations of the Council Staff and all related documentation submitted by the parties. The Council, by a majority vote, adopted said findings and recommendations. The Council, therefore, found that:

Custodian’s Counsel has failed to establish in her request for reconsideration of the Council’s June 26, 2018 Interim Order that either 1) the Council’s decision is based upon a “palpably incorrect or irrational basis;” or 2) it is obvious that the Council did not consider the significance of probative, competent evidence. Counsel failed to establish that the

¹ Represented by Vito A. Gagliardi, Esq., of Porzio, Bromberg, & Newman, P.C. (Morristown, NJ).

² Represented by Deputy Attorney General Kathryn Duran as of November 12, 2018. Previously represented by Deputy Attorney General Beth N. Shore.

³ The current Custodian of Record is Jennifer Simons. The original Custodian of Record was Donna Fletcher-Lugo.

complaint should be reconsidered based on a mistake or illegality. Counsel has also failed to show that the Council acted arbitrarily, capriciously or unreasonably. Specifically, Counsel failed to show that the Council unreasonably required disclosure of innocuous information contained in the responsive e-mails, which is consistent with past case law. Further, the e-mails that the Council determined were disclosable did not contain any information reasonably construed as falling within the attorney-client privilege. Thus, Custodian Counsel's request for reconsideration should be denied. Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996); D'Atria v. D'Atria, 242 N.J. Super. 392 (Ch. Div. 1990); In The Matter Of The Petition Of Comcast Cablevision Of S. Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Tel. Sys. In The City Of Atl. City, Cnty. Of Atl., State Of N.J., 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003). **Thus, the Council's June 26, 2018 Interim Order remains in effect and the parties shall comply accordingly.**

Procedural History:

On October 31, 2018, the Council distributed its Interim Order to all parties. On November 8, 2018, Custodian's Counsel sought an extension of time through November 19, 2018 to respond to the Interim Order, which the Government Records Council ("GRC") granted.

On November 16, 2018, the current Custodian responded to the Council's Interim Order. Therein, the current Custodian certified that she provided to the Complainant copies of all e-mails without redactions as prescribed by the Council's *In Camera* Examination. The current Custodian noted that she did not provide attachments from DOE0171 and DOE0172 because Complainant's Counsel confirmed he was already in possession of them. The current Custodian also certified that she redacted and provided to the Complainant all other e-mails with sender, recipients, date, subject, and salutations unredacted (except for e-mails originating from Complainant's Counsel, which were left unredacted).

Analysis

Compliance

At its October 30, 2018 meeting, the Council ordered the Custodian to comply with the Council's June 26, 2018 Interim Order. That Order required the Custodian to disclose records in accordance with the Council's *In Camera* Examination Findings. Further, the Order required the Custodian to submit certified confirmation of compliance, in accordance with N.J. Court Rule R. 1:4-4, to the Council Staff. On October 31, 2018, 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 November 8, 2018.

On November 8, 2018, the fifth (5th) business day after receipt of the Council's Order, Custodian's Counsel sought an extension until November 19, 2018 to comply with the Order. The GRC granted said extension. Thereafter, on November 16, 2018, within the extended time frame, the current Custodian responded to the Council's Order. Therein, the current Custodian certified that she complied fully with the Council's *In Camera* Examination Findings.

Therefore, the current Custodian complied with the Council's October 30, 2018 Interim Order because she responded in the extended time frame fully complying with the Council's *In Camera* Examination Findings. The current Custodian also simultaneously provided certified confirmation of compliance to the Council Staff.

Knowing & Willful

OPRA states that “[a] public official, officer, employee or custodian who knowingly or willfully violates [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, shall be subject to a civil penalty . . .” N.J.S.A. 47:1A-11(a). OPRA allows the Council to determine a knowing and willful violation of the law and unreasonable denial of access under the totality of the circumstances. Specifically OPRA states “. . . [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)).

Although the original Custodian unlawfully denied access to portions of the responsive e-mails, she lawfully denied access to other portions. Further, the Custodian properly complied with the Council's January 31, 2017 Interim Order and the current Custodian complied with the Council's June 26, and October 30, 2018 Interim Orders. Additionally, the evidence of record does not indicate that the original Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the original 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.

Prevailing Party Attorney's Fees

OPRA provides that:

A person who is denied access to a government record by the custodian of the record, at the option of the requestor, may: institute a proceeding to challenge the custodian's decision by filing an action in Superior Court . . .; or in lieu of filing an action in Superior Court, file a complaint with the Government Records Council . .

. A requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee.

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

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

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

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

The Mason Court accepted the application of the catalyst theory within the context of OPRA, stating that:

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

[Mason at 73-76 (2008).]

The Court in Mason, further held that:

[R]equestors are entitled to attorney’s fees under OPRA, absent a judgment or an enforceable consent decree, when they can demonstrate (1) “a factual causal nexus between plaintiff’s litigation and the relief ultimately achieved”; and (2) “that the relief ultimately secured by plaintiffs had a basis in law.” Singer v. State, 95 N.J. 487, 495, *cert denied* (1984).

[Id. at 76.]

Here, the Complainant filed this complaint arguing that the New Jersey Department of Education (“DOE”) unlawfully denied access to the e-mails responsive to his OPRA request. The Complainant asserted that these e-mails could not be exempt under the attorney-client privilege because none of the individuals identified in the subject OPRA request were attorneys. Conversely, the original Custodian argued in the Statement of Information that they properly denied access to the records because DOE’s deputy attorney generals were included and actively provided legal advice. The original Custodian also argued that the e-mails contained “inter-agency or intra-agency advisory, consultative, or deliberative” (“ACD”) material.

The Council, unable to determine whether the e-mails were exempt for the reasons asserted, ordered the records be provided for an *in camera* review. Upon review of the responsive records, the Council ordered disclosure of several e-mails without redactions. The Council further required DOE to disclose the remainder of the e-mails with redactions for the body of each communication. After the Council denied DOE’s request for reconsideration, the current Custodian complied with the Council’s June 26, and October 30, 2018 Orders on November 16, 2018. Thus, because this complaint resulted in change in DOE’s conduct, the Complainant is a prevailing party entitled to an award of reasonable attorney’s fees.

Therefore, pursuant to the Council’s June 26, and October 30, 2018 Interim Orders, the Complainant has achieved “the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian’s conduct.” Teeters, 387 N.J. Super. 432. Additionally, a factual causal nexus exists between the Complainant’s filing of a Denial of Access Complaint and the relief ultimately achieved. Mason, 196 N.J. 51. Specifically, the Council required records to be disclosed in accordance with its *In Camera* Examination Findings, which the current Custodian complied with on November 16, 2018. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney’s fee. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. 432, and Mason, 196 N.J. 51. **Based on this determination, the parties shall confer in an effort to decide the amount of reasonable attorney’s fees to be paid to Complainant within twenty (20) business days. The parties shall promptly notify the GRC in writing if a fee agreement is reached. If the parties cannot agree on the amount of attorney’s fees, Complainant’s Counsel shall submit a fee application to the Council in accordance with N.J.A.C. 5:105-2.13.**

Conclusions and Recommendations

The Council Staff respectfully recommends the Council find that:

1. The current Custodian complied with the Council's October 30, 2018 Interim Order because she responded in the extended time frame fully complying with the Council's *In Camera* Examination Findings. The current Custodian also simultaneously provided certified confirmation of compliance to the Council Staff.
2. Although the original Custodian unlawfully denied access to portions of the responsive e-mails, she lawfully denied access to other portions. Further, the Custodian properly complied with the Council's January 31, 2017 Interim Order and the current Custodian complied with the Council's June 26, and October 30, 2018 Interim Orders. Additionally, the evidence of record does not indicate that the original Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the original Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.
3. Pursuant to the Council's June 26, and October 30, 2018 Interim Orders, the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006). Additionally, a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Specifically, the Council required records to be disclosed in accordance with its *In Camera* Examination Findings, which the current Custodian complied with on November 16, 2018. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. 432, and Mason, 196 N.J. 51. **Based on this determination, the parties shall confer in an effort to decide the amount of reasonable attorney's fees to be paid to Complainant within twenty (20) business days. The parties shall promptly notify the GRC in writing if a fee agreement is reached. If the parties cannot agree on the amount of attorney's fees, Complainant's Counsel shall submit a fee application to the Council in accordance with N.J.A.C. 5:105-2.13.**

Prepared By: Frank F. Caruso
Acting Executive Director

December 11, 2018⁴

⁴ This complaint was prepared for adjudication at the Council's December 18, 2018 and January 31, 2019 meetings, but could not be adjudicated due to lack of quorum.



State of New Jersey
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PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

INTERIM ORDER

October 30, 2018 Government Records Council Meeting

Sacha Pouliot
Complainant

Complaint No. 2015-281

v.

NJ Department of Education
Custodian of Record

At the October 30, 2018 public meeting, the Government Records Council (“Council”) considered the October 23, 2018 Supplemental Findings and Recommendations of the Council Staff 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 Custodian’s Counsel has failed to establish in her request for reconsideration of the Council’s June 26, 2018 Interim Order that either 1) the Council's decision is based upon a “palpably incorrect or irrational basis;” or 2) it is obvious that the Council did not consider the significance of probative, competent evidence. Counsel failed to establish that the complaint should be reconsidered based on a mistake or illegality. Counsel has also failed to show that the Council acted arbitrarily, capriciously or unreasonably. Specifically, Counsel failed to show that the Council unreasonably required disclosure of innocuous information contained in the responsive e-mails, which is consistent with past case law. Further, the e-mails that the Council determined were disclosable did not contain any information reasonably construed as falling within the attorney-client privilege. Thus, Custodian Counsel’s request for reconsideration should be denied. Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996); D’Atria v. D’Atria, 242 N.J. Super. 392 (Ch. Div. 1990); In The Matter Of The Petition Of Comcast Cablevision Of S. Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Tel. Sys. In The City Of Atl. City, Cnty. Of Atl., State Of N.J., 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003). **Thus, the Council’s June 26, 2018 Interim Order remains in effect and the parties shall comply accordingly.**

Interim Order Rendered by the
Government Records Council
On The 30th Day of October, 2018

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: October 31, 2018

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

Reconsideration
Supplemental Findings and Recommendations of the Council Staff
October 30, 2018 Council Meeting

Sacha Pouliot¹
Complainant

GRC Complaint No. 2015-281

v.

New Jersey Department of Education²
Custodial Agency

Records Relevant to Complaint: Electronic copies via e-mail of:

1. All e-mails between Elaine Lerner, Coordinator with the Office of Special Education Programs (“SEP”), and Peggy McDonald, Director of the SEP, between September 1, 2013, and June 12, 2015, regarding the conditional approval status of the Learning Center for Exceptional Children (“LCEC”).
2. All e-mails between Linda Chavez, Supervisor of the Child Study Passaic County, and Ms. McDonald, between September 1, 2013, and June 12, 2015, regarding the conditional approval status of the LCEC.

Custodian of Record: Tara Rider³
Request Received by Custodian: June 12, 2015
Response Made by Custodian: June 23, 2015
GRC Complaint Received: September 3, 2015

Background

June 26, 2018 Council Meeting:

At its June 26, 2018 public meeting, the Council considered the May 15, 2018 *In Camera* Findings and Recommendations of the Council Staff and all related documentation submitted by the parties. The Council, by a majority vote, adopted the amended findings and recommendations. The Council, therefore, found that:

1. The Custodian complied with the Council’s January 31, 2017 Interim Order because she responded in the extended time frame supplying nine (9) copies of the unredacted e-mails at issue here for an *in camera* review and simultaneously provided certified confirmation of compliance to the Executive Director.

¹ Represented by Vito A. Gagliardi, Esq., of Porzio, Bromberg, & Newman, P.C. (Morristown, NJ).

² Represented by Deputy Attorney General Beth N. Shore.

³ The original Custodian of Record was Donna Fletcher-Lugo.

2. **On the basis of the Council’s determination in this matter, the Custodian shall comply with the Council’s Findings of the *In Camera* Examination set forth in the above table within five (5) business days from receipt of this Order and simultaneously provide certified confirmation of compliance pursuant to N.J. Court Rules, R. 1:4-4 to the GRC.⁴**
3. As to the sender, recipients, date, time, subject, and salutations (where applicable) contained the requested e-mails, the Custodian has unlawfully denied access. See Ray v. Freedom Acad. Charter Sch. (Camden), GRC Complaint No. 2009-185 (Interim Order dated August 24, 2010). Thus, the Custodian must disclose all of these portions of the responsive e-mails to the Complainant. Further, the Custodian shall not redact those e-mails within the chains originating from Complainant Counsel’s law firm. See ACLU v. N.J. Div. of Criminal Justice, 435 N.J. Super. 533 (App. Div. 2014). The GRC notes that if the Custodian intends to redact certain information in the categories identified above, she must provide a lawful basis for those redactions.
4. **The Custodian shall comply with conclusion No. 3 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 Rules, R. 1:4-4,⁵ to the GRC.⁶**
5. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian’s compliance with the Council’s Interim Order.
6. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian’s compliance with the Council’s Interim Order.

Procedural History:

On June 28, 2018, the Council distributed its Interim Order to all parties. On July 3, 2018, Custodian’s Counsel requested additional time to comply with the Council’s Order. On July 5, 2018, the Government Records Council (“GRC”) granted the Counsel’s request for an extension until July 13, 2018. On July 16, 2018, Custodian’s Counsel sought an additional one (1) day extension, or until July 17, 2018, to submit a request for reconsideration, which the GRC granted.

⁴ 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.

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 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.

On July 17, 2018, Custodian’s Counsel filed a request for reconsideration of the Council’s June 26, 2018 Interim Order based on a mistake and illegality. Counsel noted that the subject OPRA requests represented the Learning Center for Exceptional Children’s (“LCEC”) attempt to obtain documents it was denied during discovery in an unrelated litigation. Counsel thus requested that the Council reconsider its order 1) requiring disclosure of 148 e-mails with redactions; and 2) requiring disclosure of 7 additional e-mails deemed to be not exempt under OPRA.

Regarding the 148 e-mails, Counsel argued that the Council erred by ordering disclosure with redactions because they are exempt in their entirety. N.J.S.A. 47:1A-1.1; Paff v. Div. of Law, 412 N.J. Super. 140 (App. Div. 2010) (holding that the trial court erred in ordering disclosure of a list showing Administrative Agency Advice (“AAA”) topics, dates, requesting agencies, and the attorney composing the advice); Comm’n’s Wokers of America v. McCormac, 417 N.J. Super. 412 (March 5, 2008) (holding that agreements were exempt in their totality under OPRA). Counsel argued that when a record is determined to be exempt under the attorney-client privilege or “inter-agency or intra-agency advisory, consultative, or deliberative [(“ACD”)] material” exemptions are “beyond OPRA’s reach.” Paff, 412 N.J. Super. at 150. Counsel further argued that redaction of the AAA list was not required because the records were exempt in totality and thus not “government records” by definition. N.J.S.A. 47:1A-1.1; McCormac, 417 N.J. Super. at 443; see also Libertarians for Transparent Gov’t v. GRC, 453 N.J. Super. 83 (App. Div. 2018) (holding that draft minutes were exempt and should not be disclosed with redactions). Counsel also asserted that the Paff court determined that production of a Vaughn index containing basic information about AAAs was inappropriate because the actual records were exempt.

Regarding the remaining seven (7) e-mails, Counsel argued that the GRC erred by requiring disclosure because each was exempt under the attorney-client privilege. Counsel argued that each e-mail included both herself and Deputy Attorney General (“DAG”) Christopher Huber: both counseled DOE on the LCEC issue. Counsel further contended that the e-mails either discussed pending litigation or the ongoing monitoring of LCEC’s program and fiscal practices. Counsel argued that DOE0014 was sent by a DOE employee to other DOE employees and DAG Huber because he was providing advice on DOE’s monitoring of LCEC. Counsel noted that the e-mail included non-public reports. Counsel also argued that the string of e-mails labeled DOE0017-0018 between DOE employees and herself following up on a telephone conversation from the previous day was exempt. Counsel argued that the string related to pending litigation. Counsel also argued that DOE 0172-0173 containing her summary of court proceedings and DOE0072 and DOE0126 containing her forwarding of documents related to the litigation were exempt under the attorney client privilege and work product exemptions.

Analysis

Reconsideration

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

receipt of the request. The Council will provide all parties with written notification of its determination regarding the request for reconsideration. N.J.A.C. 5:105-2.10(a) – (e).

In the matter before the Council, Custodian’s Counsel filed the request for reconsideration of the June 26, 2018 Order on July 17, 2018, the last day of the second extension of time from the issuance of the Council’s Order.

Applicable case law holds that:

“A party should not seek reconsideration merely based upon dissatisfaction with a decision.” D’Atria v. D’Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990). Rather, reconsideration is reserved for those cases where (1) the decision is based upon a “palpably incorrect or irrational basis;” or (2) it is obvious that the finder of fact did not consider, or failed to appreciate, the significance of probative, competent evidence. *E.g.*, Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996). The moving party must show that the court acted in an arbitrary, capricious or unreasonable manner. D’Atria, . . . 242 N.J. Super. at 401. “Although it is an overstatement to say that a decision is not arbitrary, capricious, or unreasonable whenever a court can review the reasons stated for the decision without a loud guffaw or involuntary gasp, it is not much of an overstatement.” Ibid.

[In The Matter Of The Petition Of Comcast Cablevision Of S. Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Tel. Sys. In The City Of Atl. City, Cnty. Of Atl., State Of N.J., 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).]

After reviewing Custodian Counsel’s arguments, the GRC is not persuaded that the Council should reconsider its June 26, 2018 Interim Order.

First, Custodian’s Counsel argued that all e-mails for which the body was “deemed” to be exempt should be exempt in their entirety. However, Counsel provided no arguments as to how the information required to be disclosed (sender, recipients, date, time, subject, and salutations (where applicable)) fell within either the attorney-client privilege or “inter-agency or intra-agency advisory, consultative, or deliberative [“(ACD”)”] material” exemptions. Further, the case law Counsel cited were inapposite to the records at issue here. McCormac involved agreements and not correspondence. Further, Libertarians addressed draft documents, which by their nature are exempt in their entirety. This is not the case with e-mails, where the GRC has routinely held that innocuous information such as the date and time, senders, recipients, and most often the subject line must be disclosed. *See i.e.* Ray v. Freedom Acad. Charter Sch. (Camden), GRC Complaint No. 2009-185 (Interim Order dated August 24, 2010); Hyland v. Twp. of Lebanon, et al, GRC Complaint No. 2012-227 *et seq.* (Interim Order dated June 24, 2014); Rodriguez v. Kean Univ., GRC Complaint No. 2013-323 (Interim Order dated July 29, 2014); Discenza v. Lacey Twp. Bd. of Educ. (Ocean), GRC Complaint No. 2015-223 (Interim Order dated July 25, 2017).

Second, Counsel argued that the Council’s order requiring disclosure of certain e-mails was in error. However, each of those e-mails failed to meet the standard needed for exemption

under the attorney-client privilege. As noted by the Appellate Division in State v. Schubert, 235 N.J. Super. 212 (App. Div. 1989), merely showing that “the communication was from client to attorney does not suffice, but the circumstances indicating the intention of secrecy must appear.” Id. at 220-21. Thus, and contrary to Counsel’s argument, each e-mail ordered to be disclosed did not fall within the attorney-client privilege. Indeed, the Council’s *In Camera* Examination table clearly sets forth the reasons for requiring disclosure.

As the moving party, Custodian’s Counsel was required to establish either of the necessary criteria set forth above: either 1) the Council's decision is based upon a "palpably incorrect or irrational basis;" or 2) it is obvious that the Council did not consider the significance of probative, competent evidence. See Cummings, 295 N.J. Super. at 384. Counsel failed to establish that the complaint should be reconsidered based on a mistake or illegality. Counsel has also failed to show that the Council acted arbitrarily, capriciously or unreasonably. See D’Atria, 242 N.J. Super. at 401. Specifically, Counsel failed to show that the Council erroneously required disclosure of innocuous information contained in the responsive e-mails, which is consistent with past case law. Further, the e-mails that the Council determined were disclosable did not contain any information reasonably construed as falling within the attorney-client privilege. Thus, Counsel’s request for reconsideration should be denied. Cummings, 295 N.J. Super. at 384; D’Atria, 242 N.J. Super. at 401; Comcast, 2003 N.J. PUC at 5-6. **Thus, the Council’s June 26, 2018 Interim Order remains in effect and the parties shall comply accordingly.**

Conclusions and Recommendations

The Council Staff respectfully recommends the Council find that Custodian’s Counsel has failed to establish in her request for reconsideration of the Council’s June 26, 2018 Interim Order that either 1) the Council's decision is based upon a “palpably incorrect or irrational basis;” or 2) it is obvious that the Council did not consider the significance of probative, competent evidence. Counsel failed to establish that the complaint should be reconsidered based on a mistake or illegality. Counsel has also failed to show that the Council acted arbitrarily, capriciously or unreasonably. Specifically, Counsel failed to show that the Council unreasonably required disclosure of innocuous information contained in the responsive e-mails, which is consistent with past case law. Further, the e-mails that the Council determined were disclosable did not contain any information reasonably construed as falling within the attorney-client privilege. Thus, Custodian Counsel’s request for reconsideration should be denied. Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996); D’Atria v. D’Atria, 242 N.J. Super. 392 (Ch. Div. 1990); In The Matter Of The Petition Of Comcast Cablevision Of S. Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Tel. Sys. In The City Of Atl. City, Cnty. Of Atl., State Of N.J., 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003). **Thus, the Council’s June 26, 2018 Interim Order remains in effect and the parties shall comply accordingly.**

Prepared By: Frank F. Caruso
Communications Specialist/Resource Manager

October 23, 2018



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PHILIP D. MURPHY
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LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

INTERIM ORDER

June 26, 2018 Government Records Council Meeting

Sacha Pouliot
Complainant

Complaint No. 2015-281

v.

NJ Department of Education
Custodian of Record

At the June 26, 2018 public meeting, the Government Records Council (“Council”) considered the May 15, 2018 Findings and Recommendations of the Council Staff 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 31, 2017 Interim Order because she responded in the extended time frame supplying nine (9) copies of the unredacted e-mails at issue here for an *in camera* review and simultaneously provided certified confirmation of compliance to the Executive Director.
2. **On the basis of the Council’s determination in this matter, the Custodian shall comply with the Council’s Findings of the *In Camera* Examination set forth in the above table within five (5) business days from receipt of this Order and simultaneously provide certified confirmation of compliance pursuant to N.J. Court Rules, 1969 R. 1:4-4 (2005) to the GRC.¹**
3. As to the sender, recipients, date, time, subject, and salutations (where applicable) contained the requested e-mails, the Custodian has unlawfully denied access. See Ray v. Freedom Acad. Charter Sch. (Camden), GRC Complaint No. 2009-185 (Interim Order dated August 24, 2010). Thus, the Custodian must disclose all of these portions of the responsive e-mails to the Complainant. Further, the Custodian shall not redact those e-mails within the chains originating from Complainant Counsel’s law firm. See ACLU v. N.J. Div. of Criminal Justice, 435 N.J. Super. 533 (App. Div. 2014). The GRC notes that if the Custodian intends to redact certain information in the categories identified above, she must provide a lawful basis for those redactions.

¹ 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.



4. **The Custodian shall comply with conclusion No. 3 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 1:4-4,² to the GRC.³**
5. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
6. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Interim Order Rendered by the
Government Records Council
On The 26th Day of June, 2018

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: June 28, 2018

² "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."

³ 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.

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

***In Camera* Findings and Recommendations of the Council Staff
June 26, 2018 Council Meeting**

**Sacha Pouliot¹
Complainant**

GRC Complaint No. 2015-281

v.

**New Jersey Department of Education²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of:

1. All e-mails between Elaine Lerner, Coordinator with the Office of Special Education Programs (“SEP”), and Peggy McDonald, Director of the SEP, between September 1, 2013, and June 12, 2015, regarding the conditional approval status of the Learning Center for Exceptional Children (“LCEC”).
2. All e-mails between Linda Chavez, Supervisor of the Child Study Passaic County, and Ms. McDonald, between September 1, 2013, and June 12, 2015, regarding the conditional approval status of the LCEC.

Custodian of Record: Tara Rider³

Request Received by Custodian: June 12, 2015

Response Made by Custodian: June 23, 2015

GRC Complaint Received: September 3, 2015

Records Submitted for *In Camera* Examination: 155 e-mails between the above parties for the time period September 1, 2013 through June 12, 2015.

Background

January 31, 2017 Council Meeting:

At its January 31, 2017 public meeting, the Council considered the January 24, 2017 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council, by a majority vote, adopted said findings and recommendations. The Council, therefore, found that:

1. The GRC must conduct an *in camera* review of the 155 responsive e-mails to determine the validity of the Custodian’s assertion that the records are exempt in their entirety

¹ Represented by Vito A. Gagliardi, Esq., of Porzio, Bromberg, & Newman, P.C. (Morristown, NJ).

² Represented by Deputy Attorney General Beth N. Shore.

³ The original Custodian of Record was Donna Fletcher-Lugo.

under OPRA because they were exempt under the attorney-client privilege, attorney work-product, and/or “inter-agency or intra-agency advisory, consultative, or deliberative” exemption. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-9; NJ Court Rules, 1969 R. 4:10-2(c). See Paff v. NJ Dep’t of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005).

2. **The Custodian must deliver⁴ to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see No. 1 above), a document or redaction index⁵, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,⁶ 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.**
3. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian’s compliance with the Council’s Interim Order.
4. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian’s compliance with the Council’s Interim Order.

Procedural History:

On February 2, 2017, The Council distributed its Interim Order to all parties on. On February 8, 2017, Custodian’s Counsel sought an extension until February 14, 2017 to submitted compliance, which the GRC granted.

On February 14, 2017, the Custodian responded to the Council’s Interim Order. Therein, the Custodian certified that she was providing nine (9) copies of the 155 e-mails requested for an *in camera* review.

Analysis

Compliance

At its January 31, 2017 meeting, the Council ordered the Custodian to the Council ordered the Custodian to provide nine (9) copies of the unredacted e-mails at issue here for an *in camera* review. Further, the Council ordered the Custodian to simultaneously provide certified confirmation of compliance to the Executive Director. On February 2, 2017, the Council distributed its Interim Order to all parties, providing the Custodian five (5) business days to comply

⁴ 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.

⁵ The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

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."

with the terms of said Order. Thus, the Custodian's response was due by close of business on February 9, 2017.

On February 8, 2017, the fourth (4th) business day after receipt of the Council's Order, Custodian's Counsel sought an extension until February 14, 2017. The GRC granted said extension. On February 14, 2017, the Custodian responded to the Council's Order providing nine (9) copies of the requested e-mails for *in camera* review. Additionally, the Custodian provided certified confirmation of compliance to the Executive Director.

Therefore, the Custodian complied with the Council's January 31, 2017 Interim Order because she responded in the extended time frame supplying nine (9) copies of the unredacted e-mails at issue here for an *in camera* review and simultaneously provided certified confirmation of compliance to the Executive Director.

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.

OPRA provides that the definition of a government record "shall not include . . . inter-agency or intra-agency advisory, consultative, or deliberative [("ACD")] material." When the exception is invoked, a governmental entity may "withhold documents that reflect advisory opinions, recommendations, and deliberations comprising part of a process by which governmental decisions and policies are formulated." Educ. Law Center v. N.J. Dep't of Educ., 198 N.J. 274, 285 (2009)(citing NLRB v. Sears, Roebuck & Co., 421 U.S. 132 (1975)). The New Jersey Supreme Court has also ruled that a record that contains or involves factual components is entitled to deliberative-process protection under the exemption in OPRA when it was used in decision-making process *and* its disclosure would reveal deliberations that occurred during that process. Educ. Law Ctr., 198 N.J. 274.

A custodian claiming an exception to the disclosure requirements under OPRA on that basis must initially satisfy two conditions: 1) the document must be pre-decisional, meaning that the document was generated prior to the adoption of the governmental entity's policy or decision; and 2) the document must reflect the deliberative process, which means that it must contain opinions, recommendations, or advice about agency policies. Id. at 286 (internal citations and quotations omitted). The key factor in this determination is whether the contents of the document reflect "formulation or exercise of . . . policy-oriented judgment or the process by which policy is formulated." Id. at 295 (adopting the federal standard for determining whether material is "deliberative" and quoting Mapother v. Dep't of Justice, 3 F.3d 1533, 1539 (D.C. Cir. 1993)). Once the governmental entity satisfies these two threshold requirements, a presumption of confidentiality is established, which the requester may rebut by showing that the need for the materials overrides the government's interest in confidentiality. Id. at 286-87.

The Council has also repeatedly held that draft records of a public agency fall within the deliberative process privilege. In Dalesky v. Borough of Raritan (Somerset), GRC Complaint No. 2008-61 (November 2009), the Council, in upholding the custodian's denial as lawful, determined that the requested record was a draft document and that draft documents in their entirety are ACD material pursuant to N.J.S.A. 47:1A-1.1. Subsequently, in Shea v. Village of Ridgewood (Bergen), GRC Complaint No. 2010-79 (February 2011), the custodian certified that a requested letter was a draft that had not yet been reviewed by the municipal engineer. The Council, looking to relevant case law, concluded that the requested letter was exempt from disclosure under OPRA as ACD material. See also Ciesla v. N.J. Dep't of Health and Senior Serv., GRC Complaint No. 2010-38 (May 2011)(aff'd Ciesla v. N.J. Dep't of Health & Senior Serv., 429 N.J. Super. 127 (App. Div. 2012) (holding that a draft staff report was exempt from disclosure as ACD material).

Further, OPRA provides that a "government record" shall not include "any record within the attorney-client privilege." N.J.S.A. 47:1A-1.1 (emphasis added). To assert attorney-client privilege, a party must show that there was a confidential communication between lawyer and client in the course of that relationship and in professional confidence. N.J.R.E. 504(1). Such communications are only those "which the client either expressly made confidential or which [one] could reasonably assume under the circumstances would be understood by the attorney to be so intended." State v. Schubert, 235 N.J. Super. 212, 221 (App. Div. 1989). However, merely showing that "the communication was from client to attorney does not suffice, but the circumstances indicating the intention of secrecy must appear." Id. at 220-21.

Similarly, "[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." New Jersey Court Rules, R. 4:10-2(c).

In the context of public entities, the attorney-client privilege extends 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. Declaratory Judgment Actions, 259 N.J. Super. 308, 313 (App. Div. 1992).

The GRC conducted an *in camera* examination on the submitted records. The full universe of records comprised of 155 e-mails between DOE employees and their DAG regarding Learning Center for Exceptional Children ("LCEC"). Some of those included attachments that the record indicates were draft documents not subject to disclosure pursuant to Ciesla, 429 N.J. Super. 127 and prevailing case law. Thus, the GRC will only address those attachments below that are not "draft" documents on their face.

The results of this examination are set forth in the following table. The GRC notes that only those e-mails where it has determined the asserted privilege does not apply (in part or whole) are listed below. The GRC will not list any e-mails to which it deems that exemptions properly applied to the body of same.

Record No. By Bate Stamp	Record Name/Date	Description of Record	Custodian's Explanation/ Citation for Non-disclosure	Findings of the <i>In Camera</i> Examination ⁷
DOE0017 thru DOE0018	E-mail chain dated January 15, 2015 (9:40 a.m.)	E-mail from Elaine Lerner to multiple parties forwarding statutory requirements for teaching position.	Attorney-client privilege, attorney-work product, and ACD material. <u>N.J.S.A. 47:1A-1.1</u> ; <u>N.J.S.A. 47:1A-9(b)</u> ; <u>R. 4:10-2(c)</u> .	Here, Ms. Lerner asked about and received guidance from another DOE employee, which she then shared with colleagues. The e-mail chain does not contain attorney-client privilege or ACD material. Thus, the Custodian has unlawfully denied access to this e-mail chain and must disclose it. <u>N.J.S.A. 47:1A-6.</u>
DOE0014	E-mail dated January 9, 2015 (9:52 a.m.)	E-mail from Elain Lerner to multiple parties attaching "nonpublic reports."	Attorney-client privilege, attorney-work product, and ACD material. <u>N.J.S.A. 47:1A-1.1</u> ; <u>N.J.S.A. 47:1A-9(b)</u> ; <u>R. 4:10-2(c)</u> .	Here, Ms. Lerner provided reports to several parties. The e-mail chain does not contain attorney-client privilege or ACD material. Thus, the Custodian has unlawfully denied access to this e-mail chain and must disclose it. <u>N.J.S.A. 47:1A-6.</u>
DOE0071	E-mail chain dated March 23, 2015 (4:31 p.m.)	E-mail from Linda Chavez to Custodian's Counsel regarding failed receipt of an e-mail.	Attorney-client privilege, attorney-work product, and ACD material. <u>N.J.S.A. 47:1A-1.1</u> ; <u>N.J.S.A.</u>	Here, Ms. Chavez notes that she did not receive an e-mail. The instant e-mail chain does not contain any attorney-client privileged or ACD material. Thus, the Custodian has unlawfully denied access to this e-mail

⁷ **Unless expressly identified for redaction, everything in the record shall be disclosed.** For purposes of identifying redactions, unless otherwise noted a paragraph/new paragraph begins whenever there is an indentation and/or a skipped space(s). The paragraphs are to be counted starting with the first whole paragraph in each record and continuing sequentially through the end of the record. If a record is subdivided with topic headings, renumbering of paragraphs will commence under each new topic heading. Sentences are to be counted in sequential order throughout each paragraph in each record. Each new paragraph will begin with a new sentence number. If only a portion of a sentence is to be redacted, the word in the sentence which the redaction follows or precedes, as the case may be, will be identified and set off in quotation marks. If there is any question as to the location and/or extent of the redaction, the GRC should be contacted for clarification before the record is redacted. The GRC recommends the redactor make a paper copy of the original record and manually "black out" the information on the copy with a dark colored marker, then provide a copy of the blacked-out record to the requester.

			47:1A-9(b); <u>R.</u> 4:10-2(c).	chain and must disclose it. <u>N.J.S.A. 47:1A-6.</u>
DOE0126 Note: Also present in DOE0119 thru DOE0126	E-mail chain dated April 22, 2015 (12:39 p.m.)	E-mail from Custodian’s Counsel forwarding to multiple parties a submission from LCEC’s legal representative without comment.	Attorney-client privilege, attorney-work product, and ACD material. <u>N.J.S.A. 47:1A-1.1;</u> <u>N.J.S.A. 47:1A-9(b); R.</u> 4:10-2(c).	Here, Custodian’s Counsel forwards an attachment sent from LCEC legal representatives to multiple parties. The instant e-mail chain does not contain any attorney-client privileged or ACD material. Thus, the Custodian has unlawfully denied access to this e-mail chain and must disclose it. <u>N.J.S.A. 47:1A-6.</u> The above is applicable to each instance that the e-mail chain appears in DOE0119 thru DOE0126, but does not apply any other e-mails not addressed in this table included therein.
DOE0171	E-mail chain dated July 3, 2014 (2:49 p.m.)(with attachment).	E-mail from Custodian’s Counsel to multiple parties forwarding an Office of Administrative Law (“OAL”) Order (attached).	Attorney-client privilege, attorney-work product, and ACD material. <u>N.J.S.A. 47:1A-1.1;</u> <u>N.J.S.A. 47:1A-9(b); R.</u> 4:10-2(c).	Here, Custodian’s Counsel provides an OAL Order to multiple parties and briefly recapitulates the events leading to the Order. This e-mail does not contain any attorney-client privileged information or ACD material; rather, it is general information. Further, the attachment is an OAL Order not otherwise subject to the asserted exemptions. Thus, the Custodian has unlawfully denied access to this e-mail chain, as well as the attachment, and must disclose them. <u>N.J.S.A. 47:1A-6.</u>
DOE0172	E-mail chain dated August 28, 2014 (2:13 p.m.)(with attachment).	E-mail from Custodian’s Counsel to multiple parties forwarding an OAL Initial	Attorney-client privilege, attorney-work product, and ACD material. <u>N.J.S.A.</u>	As noted in DOE0171 above, neither the e-mail or the attachment contain attorney-client privileged information or ACD material. Thus, the

		Decision and Order (attached).	47:1A-1.1; <u>N.J.S.A.</u> 47:1A-9(b); <u>R.</u> 4:10-2(c).	Custodian has unlawfully denied access to this e-mail chain, as well as the attachment, and must disclose them. <u>N.J.S.A.</u> 47:1A-6.
DOE0538	E-mail dated December 11, 2014 (1:48 p.m.)	E-mail from John Worthington to multiple parties regarding a call-in meeting.	Attorney-client privilege, attorney-work product, and ACD material. <u>N.J.S.A.</u> 47:1A-1.1; <u>N.J.S.A.</u> 47:1A-9(b); <u>R.</u> 4:10-2(c).	<p>Here, the body of the e-mail contains basic information about an upcoming meeting, to include the call in number and “Access Code” that will be addressed below. The e-mail body does not fall within the asserted exemptions because it does not contain ACD material or any type of attorney-client privilege. Thus, the Custodian has unlawfully denied access to this e-mail and must disclose them. <u>N.J.S.A.</u> 47:1A-6.</p> <p>Regarding the conference call number and “Access Code,” said information is exempt from disclosure as an unlisted telephone number and administrative or technical information respectively. <u>N.J.S.A.</u> 47:1A-1.1. Specifically, disclosure of the number and access code would allow an individual to infiltrate or otherwise compromise any conference calls occurring on that number. For these reasons, the Custodian has lawfully denied access to this information, and may redact it accordingly. <u>N.J.S.A.</u> 47:1A-6.</p>

For all e-mails not listed above, the asserted exemptions apply and the Custodian lawfully denied access to the body of each e-mail. N.J.S.A. 47:1A-6. Specifically, the e-mails contain a mixture of internal discussions regarding LCEC and its approval status. These e-mails are exactly the type of records that the ACD exemption was intended to protect. Further, some of the e-mails contain attorney-client privileged communications between the Custodian's Counsel and DOE employees. These communications are directly linked to pending actions in, at the least, the OAL and also contain advice regarding the LCEC issue. Further, a number of the communications include attorney work-product from Custodian's Counsel to DOE.

Additionally, consistent with N.J.S.A. 47:1A-5(g), if the custodian of a government record asserts that part of a particular record is exempt from public access pursuant to OPRA, the custodian must delete or excise from a copy of the record that portion which the custodian asserts is exempt from access and must promptly permit access to the remainder of the record. In prior decisions, the Council has routinely required disclosure of certain information contained within e-mails, to include sender, recipients, date, time, subject, and salutations (where applicable). See Ray v. Freedom Acad. Charter Sch. (Camden), GRC Complaint No. 2009-185 (Interim Order dated August 24, 2010); Verry v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2013-287 (Interim Order dated June 30, 2015).

Additionally, several of the e-mails contain communications sent to DOE from Complainant Counsel's law firm. It is currently unclear whether the Complainant is in possession of these e-mails. Notwithstanding, while the individual e-mails contained within the responsive e-mail chains are not responsive to the Complainant's OPRA request, precedential case law does not support redaction of these e-mails on that basis. See ACLU v. N.J. Div. of Criminal Justice, 435 N.J. Super. 533 (App. Div. 2014) (holding that an agency cannot redact non-responsive information in a "government record"); D'Andrea v. N.J. Civil Serv. Comm'n, GRC Complaint No. 2014-153 (April 2015). For this reason, and unless any other exemptions apply, the Custodian has no basis to redact these individual e-mails as part of her compliance.

Accordingly, as to the sender, recipients, date, time, subject, and salutations (where applicable) contained the requested e-mails, the Custodian has unlawfully denied access. See Ray, GRC 2009-185. Thus, the Custodian must disclose all of these portions of the responsive e-mails to the Complainant. Further, the Custodian shall not redact those e-mails within the chains originating from Complainant Counsel's law firm. See ACLU, 435 N.J. Super. 533. The GRC notes that if the Custodian intends to redact certain information in the categories identified above, she must provide a lawful basis for those redactions.

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.

Prevailing Party Attorney's Fees

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

Conclusions and Recommendations

The Council Staff respectfully recommends the Council find that:

1. The Custodian complied with the Council's January 31, 2017 Interim Order because she responded in the extended time frame supplying nine (9) copies of the unredacted e-mails at issue here for an *in camera* review and simultaneously provided certified confirmation of compliance to the Executive Director.
2. **On the basis of the Council's determination in this matter, the Custodian shall comply with the Council's Findings of the *In Camera* Examination set forth in the above table within five (5) business days from receipt of this Order and simultaneously provide certified confirmation of compliance pursuant to N.J. Court Rules, 1969 R. 1:4-4 (2005) to the GRC.⁸**
3. As to the sender, recipients, date, time, subject, and salutations (where applicable) contained the requested e-mails, the Custodian has unlawfully denied access. See Ray v. Freedom Acad. Charter Sch. (Camden), GRC Complaint No. 2009-185 (Interim Order dated August 24, 2010). Thus, the Custodian must disclose all of these portions of the responsive e-mails to the Complainant. Further, the Custodian shall not redact those e-mails within the chains originating from Complainant Counsel's law firm. See ACLU v. N.J. Div. of Criminal Justice, 435 N.J. Super. 533 (App. Div. 2014). The GRC notes that if the Custodian intends to redact certain information in the categories identified above, she must provide a lawful basis for those redactions.
4. **The Custodian shall comply with conclusion No. 3 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 1:4-4,⁹ to the GRC.¹⁰**

⁸ 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.

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 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.

5. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
6. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Prepared By: Frank F. Caruso
Communications Specialist/Resource Manager

May 15, 2018¹¹

¹¹ This complaint was prepared for adjudication at the Council's May 22, 2018 meeting but could not be adjudicated due to lack of a quorum.



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

January 31, 2017 Government Records Council Meeting

Sacha Pouliot
Complainant

Complaint No. 2015-281

v.

NJ Department of Education
Custodian of Record

At the January 31, 2017 public meeting, the Government Records Council (“Council”) considered the January 24, 2017 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 GRC must conduct an *in camera* review of the 155 responsive e-mails to determine the validity of the Custodian’s assertion that the records are exempt in their entirety under OPRA because they were exempt under the attorney-client privilege, attorney work-product, and/or “inter-agency or intra-agency advisory, consultative, or deliberative” exemption. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-9; NJ Court Rules, 1969 R. 4:10-2(c). See Paff v. NJ Dep’t of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005).
2. **The Custodian must deliver¹ to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see No. 1 above), 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.**
3. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian’s compliance with the Council’s Interim Order.
4. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian’s compliance with the Council’s Interim Order.

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."

Interim Order Rendered by the
Government Records Council
On The 31st Day of January, 2017

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 2, 2017

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
January 31, 2017 Council Meeting**

**Sacha Pouliot¹
Complainant**

GRC Complaint No. 2015-281

v.

**New Jersey Department of Education²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of:

1. All e-mails between Elaine Lerner, Coordinator with the Office of Special Education Programs (“SEP”), and Peggy McDonald, Director of the SEP, between September 1, 2013, and June 12, 2015, regarding the conditional approval status of the Learning Center for Exceptional Children (“LCEC”).
2. All e-mails between Linda Chavez, Supervisor of the Child Study Passaic County, and Ms. McDonald, between September 1, 2013, and June 12, 2015, regarding the conditional approval status of the LCEC.

Custodian of Record: Tara Rider³
Request Received by Custodian: June 12, 2015
Response Made by Custodian: June 23, 2015
GRC Complaint Received: September 3, 2015

Background⁴

Request and Response:

On June 12, 2015, the Complainant submitted two (2) Open Public Records Act (“OPRA”) requests to the original Custodian seeking the above-mentioned records. On June 23, 2015, the Custodian responded in writing, seeking an extension of time until July 2, 2015, to respond. On July 2, 2015, the original Custodian responded in writing, seeking another extension of time until July 6, 2015. On July 6, 2015, the Custodian responded in writing disclosing one (1) record and denying access to 155 additional e-mails under the attorney-client privilege exemption. N.J.S.A. 47:1A-1.1.

¹ Represented by Vito A. Gagliardi, Esq., of Porzio, Bromberg, & Newman, P.C. (Morristown, NJ).

² Represented by Deputy Attorney General Beth N. Shore.

³ The original Custodian of Record was Donna Fletcher-Lugo.

⁴ 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.

Denial of Access Complaint:

On September 3, 2015, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant disputed the original Custodian’s denial of access, arguing that none of the individuals referenced in the OPRA request were attorneys. The Complainant thus asserted that the e-mails could not be exempt under the attorney-client privilege exemption.

Statement of Information:

On October 22, 2015, the Custodian filed a Statement of Information (“SOI”). The original Custodian certified that she received the Complainant’s OPRA requests on June 12, 2015. The original Custodian certified that her search included performing an e-mail search based on the Complainant’s criteria. The original Custodian certified that, following two (2) extensions, she responded in writing on July 6, 2015, disclosing one (1) record and denying access to 155 e-mails under the attorney-client privilege exemption.

The original Custodian certified that the Complainant is an employee at the LCEC. The original Custodian affirmed that the responsive e-mails were between Ms. Chavez, Ms. Lerner, other New Jersey Department of Education (“DOE”) representatives, and the Custodian’s Counsel and were related to pending and prospective litigation between DOE and the LCEC. The original Custodian also noted that the e-mails also include draft documents, settlement discussions, and details about DOE’s decision-making process about the LCEC’s conditional approval status.

The original Custodian contended that the attorney-client privilege exemption applied to the responsive records because the Custodian’s Counsel, who is also DOE’s deputy attorney general, provided legal advice regarding the LCEC’s approval status and its pending appeal about that status. N.J.S.A. 47:1A-1.1; NJ Court Rules, 1969 R. 4:10-2(c); O’Boyle v. Borough of Longport, 218 N.J. 168, 185 (2014); Paff v. Div. of Law, 412 N.J. Super. 140, 150 (App. Div. 2010). The original Custodian further contended that the draft document attachments contained the Custodian Counsel’s comments, which included her “mental impressions, opinions, and legal conclusions” that are exempt under the attorney work-product exemption. NJ Court Rules R. 4:10-2(c); O’Boyle, 218 N.J. Super. at 188; Gannett N.J. Partners, LP v. Cnty. of Middlesex, 379 N.J. Super. 205, 218 (App. Div. 2005).

The original Custodian also argued that the withheld e-mails fell within the “inter-agency or intra-agency advisory, consultative, or deliberative” (“ACD”) exemption because they meet the two-prong test: 1) the records were generated prior to adoption or decision on agency policy, and 2) the records contained opinions, recommendations, or advice about those policies. N.J.S.A. 47:1A-1.1; Educ. Law Ctr. v. N.J. Dep’t of Educ., 198 N.J. 274, 286 (2009). The original Custodian also noted that the New Jersey Courts have held that draft documents are exempt from disclosure as ACD material. Ciesla v. N.J. Dep’t of Health & Senior Serv., 429 N.J. Super. 127, 137 (App. Div. 2012)(*citing* Educ. Law Ctr., 198 N.J. at 284 (2009)). The original Custodian argued that the denied e-mails clearly speak to DOE’s decision-making process regarding the LCEC’s approval status and continued DOE monitoring. The original Custodian asserted that the

e-mails contain the necessary back-and-forth between DOE employees regarding the formulation of agency policy. The original Custodian asserted that the denied e-mails reflect “the kind of plain talk that is essential to the quality of [government’s] functioning,” the disclosure of which would chill open and frank discussion within DOE. Educ. Law Ctr., 198 N.J. at 287.

Additional Submissions:

On November 3, 2015, the Complainant’s Counsel sent a letter to the GRC arguing that the original Custodian violated OPRA by failing to complete a Vaughn Index as part of the SOI. Tucker Dev. & Acquisition Fund, LP v. Borough of Fort Lee, 2010 N.J. Super. Unpub. LEXIS 3089 (August 20, 2010)(*citing* O’Connor v. United States Dep’t of Treasury, 570 F.Supp. 2d 749, 765 (E.D. Pa. 2008)). Counsel further disputed the original Custodian’s new assertion that the responsive records constituted ACD material. Counsel requested that, should the GRC accept these new arguments, he be given an opportunity to submit formal objections.

Analysis

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.

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 Council⁵ that accepted the custodian’s legal conclusion for the denial of access without further review. The Appellate Division noted 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. The Court stated that:

[OPRA] 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-7(f). This provision would be unnecessary if the Legislature did not intend to permit *in camera* review.

Id. at 355.

⁵ Paff v. NJ Dep’t of Labor, Bd. of Review, GRC Complaint No. 2003-128 (October 2005).

Further, the Court found that:

We 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-7(f), which provides for closed meeting when necessary to avoid disclosure before resolution of a contested claim of exemption.

Id.

Here, the original Custodian denied the Complainant access to 155 e-mails between several individuals and the Custodian's Counsel regarding LCEC based on the attorney-client privilege. N.J.S.A. 47:1A-1.1. The Complainant subsequently filed this complaint, arguing that the attorney client privilege exemption did not apply here because none of the identified individuals in her OPRA request were attorneys. In the SOI, the original Custodian argued that the records were also exempt under the attorney work product exemption and as ACD material. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-9; R. 4:10-2(c). Thus, the GRC must review *in camera* the pages containing the disputed redactions in order to determine the full applicability of the cited exemptions.

Therefore, the GRC must conduct an *in camera* review of the 155 responsive e-mails to determine the validity of the Custodian's assertion that the records are exempt in their entirety under OPRA because they were exempt under the attorney-client privilege, attorney work-product, and/or ACD exemption. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-9; R. 4:10-2(c) See Paff, 379 N.J. Super. at 346.

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.

Prevailing Party Attorney's Fees

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

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The GRC must conduct an *in camera* review of the 155 responsive e-mails to determine the validity of the Custodian's assertion that the records are exempt in their entirety under OPRA because they were exempt under the attorney-client privilege,

attorney work-product, and/or “inter-agency or intra-agency advisory, consultative, or deliberative” exemption. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-9; NJ Court Rules, 1969 R. 4:10-2(c). See Paff v. NJ Dep’t of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005).

2. **The Custodian must deliver⁶ to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see No. 1 above), a document or redaction index⁷, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,⁸ 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.**
3. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian’s compliance with the Council’s Interim Order.
4. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian’s compliance with the Council’s Interim Order.

Prepared By: Frank F. Caruso
Communications Specialist/Resource Manager

January 24, 2017

⁶ 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.

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

⁸ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."