



**State of New Jersey**  
DEPARTMENT OF COMMUNITY AFFAIRS  
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TRENTON, NJ 08625-0819

**PHILIP D. MURPHY**  
*Governor*

**LT. GOVERNOR SHEILA Y. OLIVER**  
*Commissioner*

**FINAL DECISION**

**May 22, 2018 Government Records Council Meeting**

Robert Lefkowitz  
Complainant

Complaint No. 2016-138

v.

Montville Township Public Schools (Mercer)  
Custodian of Record

At the May 22, 2018 public meeting, the Government Records Council (“Council”) considered the May 15, 2018 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that the requested tests and quizzes are exempt from disclosure under OPRA pursuant to Executive Order No. 9 (Gov. Hughes, 1963) because New Jersey Department of Education’s regulations require boards of education to administer them as “benchmark assessments.” N.J.A.C. 6A:8-3.1(c)(3)(iii). Thus, the Custodian lawfully denied access to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. Further, because the records are exempt under Executive Order No. 9 (Gov. Hughes, 1963), the GRC declines to address whether the “inter-agency or intra-agency advisory, consultative, or deliberative material” exemption also applied to them.

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 22<sup>nd</sup> Day of May, 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: May 25, 2018**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Council Staff  
May 22, 2018 Council Meeting**

**Robert Lefkowitz<sup>1</sup>  
Complainant**

**GRC Complaint No. 2016-138**

v.

**Montville Township Public Schools (Morris)<sup>2</sup>  
Custodial Agency**

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

1. All 7<sup>th</sup> Grade Honors Math quizzes, tests, or exams for the 2014-2015 school year.
2. All Geometry Honors quizzes, tests, or exams (including final exam) from March, April, May, and June 2015.
3. All Geometry Honors quizzes, tests, or exams (including final exam) from March, April, May, and June 2014.

**Custodian of Record:** James T. Tevis

**Request Received by Custodian:** April 15, 2016

**Response Made by Custodian:** April 25, 2016

**GRC Complaint Received:** May 10, 2016

**Background<sup>3</sup>**

**Request and Response:**

On April 14, 2016, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On April 25, 2016, the Custodian responded in writing denying access to the OPRA request under N.J.S.A. 47:1A-1.1, which exempted access to “test questions, scoring keys[,] and other examination data pertaining to . . . an . . . academic examination.” N.J.S.A. 47:1A-1.1; See also Executive Order No. 9 (Gov. Hughes, 1963) (“EO 9”) (exempting “[q]uestions on examinations required to be conducted by any State or local governmental agency”). The Custodian also noted that disclosure would jeopardize both the security and confidentiality of the tests, both of which are essential to preserving the integrity of the exam process.

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

<sup>2</sup> Represented by Stephen M. Bacigalupo, II, Esq., of Schwartz, Simon, Edlestein & Celso, LLC (Whippany, NJ).

<sup>3</sup> 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 Council Staff the submissions necessary and relevant for the adjudication of this complaint.

On the same day, the Complainant e-mailed the Custodian disputing his denial of access. The Complainant averred that the exam exemption in OPRA did not apply to high schools or middle schools. The Complainant sought clarification on whether the Custodian misinterpreted the exemption and whether he would receive the responsive records.

On April 26, 2016, the Custodian responded to the Complainant's e-mail reissuing his denial of access to the requested records.

#### Denial of Access Complaint:

On May 10, 2016, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant disputed the Custodian's denial of access for the reasons stated in his April 25, 2016 e-mail. The Complainant asserted that he attempted to resolve the denial informally prior to filing this complaint.

#### Statement of Information:<sup>4</sup>

On July 14, 2016, the Custodian filed a Statement of Information ("SOI"). The Custodian certified that he received the Complainant's OPRA request on April 15, 2016. The Custodian certified that his search included reviewing the School Board's files and contacting the teachers who taught the identified subjects. The Custodian also certified that benchmark assessments in the identified subject areas would be maintained by the Assistant Superintendent for Curriculum and Instruction. The Custodian certified that he responded in writing on April 25, 2016, denying the Complainant's OPRA request under N.J.S.A. 47:1A-1.1 and EO 9. Further, the Custodian certified that he advised the Complainant that disclosure of the records would jeopardize both test security and confidentiality, which were essential to preserving the integrity of the exam process.

The Custodian contended that he lawfully denied access to the Complainant's OPRA request. The Custodian stated that OPRA's enactment in 2002 codified multiple exemptions to include a personal privacy exemption, a higher education "test questions, scoring keys[,] and other examination data . . ." exemption, and for records "which, if disclosed, would give an advantage to competitors or bidders." N.J.S.A. 47:1A-1; N.J.S.A. 47:1A-1.1. The Custodian also stated that OPRA exempts access to "inter-agency or intra-agency advisory, consultative, or deliberative [(“ACD”)] material," of which draft documents are included in said definition. See N.J.S.A. 47:1A-1.1; Educ. Law Ctr. v. N.J. Dep't of Educ., 198 N.J. 274 284-286 (2009); Ciesla v. N.J. Dep't of Health and Senior Serv., 429 N.J. Super. 127, 140-141 (App. Div. 2012).

The Custodian stated that State agencies simultaneously considered promulgating regulations to exempt specific types of records from access. The Custodian averred that the New Jersey Department of Education ("NJDOE") proposed an exemption for "tests, test items, or test scoring keys to be used as part of the Statewide assessment system" and "tests, test questions, scoring keys, and other examination data pertaining to the administration of an examination or an application for public employment or licensing." 34 N.J.R. 2224(a) (July 11, 2002). The

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<sup>4</sup> On June 1, 2016, this complaint was referred to mediation. On June 13, 2016, this complaint was referred back to the GRC for adjudication.

Custodian asserted that NJDOE reasoned that “[i]n order to protect the integrity of standardized tests, which must be replaced at considerable delay and cost if compromised by the revelation of test items, [NJDOE] is designating as confidential all tests, test items or test scoring keys to be used as part of the Statewide assessment system.” Id. The Custodian further noted that subsequent to NJDOE’s proposal, Governor McGreevey issued Executive Order No. 26 (Gov. McGreevey, 2002)(“EO 26”) that mirrored, among other proposed regulations, NJDOE’s test exemption “pertaining to the administration of an examination for public employment or licensing.” Id.

The Custodian thus contended that OPRA’s Legislative history and NJDOE’s rationale regarding the protection of Statewide assessments from access under OPRA is relevant in this matter. He argued that parents seeking quizzes, tests, and examinations on behalf of their children before administration of the test would abrogate the child’s responsibility to study for them. The Custodian contended that disclosure of these records would “rock the foundation of [New Jersey’s] educational system.” The Custodian also argued that requiring disclosure of previous administered tests is equally problematic if the teachers are using the same tests annually. The Custodian also argued that disclosure prior to the administration of the test would go against the ACD exemption considering that the tests would be subject to change.

Finally, the Custodian contended that this complaint was frivolous because it was filed in bad faith. N.J.S.A. 2A:15-59.1; Deutch & Shur, P.C. v. Roth, 284 N.J. Super. 133, 139 (March 3, 1995); Caggiano v. Borough of Stanhope (Sussex), GRC Complaint No. 2007-161 (October 2007). The Custodian argued that he properly denied the Complainant, who then appeared before the School Board regarding the request. The Custodian averred that the School Board advised him to address his concerns to the administration; however, the Complainant filed this complaint instead. The Custodian further noted that the Complainant agreed to mediate the complaint, but then withdrew. The Custodian asserted that this behavior was indicative of that fact that the subject complaint was not filed in good faith, but to harass the School Board.

#### Additional Submissions:

On July 25, 2016, the Complainant sent the GRC a letter refuting the Custodian’s SOI. Therein, the Complainant disputed that disclosure of the requested records are exempt simply because OPRA exempts access to other types of tests. The Complainant noted that OPRA only exempts access to test records from higher education institutions and not middle or high schools. The Complainant contended that teachers generally return completed tests. The Complainant also contended that, per “the stated practice,”<sup>5</sup> teachers are the keepers of their own test records. The Complainant asserted that although an older sibling may not have the benefit of seeing it beforehand, a younger sibling may benefit from the returned test. The Complainant argued that at that point, the test is no longer confidential. The Complainant noted that he sought access to test administered in the prior school year. The Complainant asserted that he submitted his OPRA request in April, which would have given the teachers administering the same tests from prior years a chance to amend them.

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<sup>5</sup> The Complainant does not say whether this statement was based on a written policy from the School Board.

The Complainant disputed that the “advantage to bidders and competitors” exemption applied here, because that exemption is specific to the bid process and not test-taking. The Complainant also questioned whether NJDOE’s proposed regulations applied, especially given that they were not adopted. The Complainant also disputed that the tests were ACD in nature.

Finally, the Complainant adamantly disputed that he filed this complaint in bad faith and that same was frivolous. The Complainant asserted that the School Board is well aware that he met with School Board administrators prior to going to the School Board meeting. The Complainant asserted that the Superintendent advised at the meeting that she would follow up with the administrators, but she never got back to him. The Complainant further argued that he withdrew from mediation because he determined that the possibility of receiving partial information would not meet his goal of obtaining proper tutoring for his children. The Complainant also averred that his (and his wife’s) history of educational volunteerism for the School Board and local library that long predates this OPRA request proves that he did not file the complaint in bad faith.

### 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.

The GRC first notes that the disclosability of secondary education tests, quizzes, and exams presents a novel issue. The Council has never before addressed the disclosability of these records, nor could the GRC locate any New Jersey Superior or Supreme Court decisions on this issue. Thus, the GRC will proceed with its analysis as a matter of first impression.<sup>6</sup>

OPRA provides for multiple exemptions, including “[ACD] material.” N.J.S.A. 47:1A-1.1. Additionally, OPRA exempts access to “with regard to any public institution of higher education . . . *test questions, scoring keys and other examination data pertaining to the administration of an examination for employment or academic examination.*” Id. (emphasis added). Moreover, OPRA provides that:

[S]hall not abrogate any exemption of a public record or government record from public access heretofore made pursuant to [OPRA]; any other statute; resolution

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<sup>6</sup> The parties also engaged in arguments over whether the Complainant filed this complaint in bad faith and that it was frivolous. The GRC has previously looked to N.J.S.A. 2A:15-59.1(b)(2), which provides that a complaint is frivolous if the “[t]he non[-]prevailing party knew, or should have known, that the complaint . . . was without any reasonable basis in law . . .” See Valdes v. Union City Bd. of Educ. (Hudson), GRC Complaint No. 2013-147, *et seq.* (September 2014). The GRC notes that, on its face, the novel nature of this complaint does not approach the standard set forth in N.J.S.A. 2A:15-59.1(b)(2). Further, the Complainant availing himself of his statutory right under N.J.S.A. 47:1A-6 to challenge the alleged unlawful denial of access with the GRC, as opposed to following the School Board’s advice and speaking to the administration, does not itself render a complaint frivolous.

of either or both Houses of the Legislature; regulation promulgated under the authority of any statute or Executive Order of the Governor; *Executive Order of the Governor*; Rules of Court; any federal law; federal regulation; or federal order.

[N.J.S.A. 47:1A-9(a) (emphasis added)].

To this end, EO 9<sup>7</sup> sets forth multiple exemptions under OPRA, to include “[q]uestions on examinations required to be conducted by *any State or local governmental agency*.” Id. Further, EO 26 exempts access to “[t]est questions, scoring keys and other examination data pertaining to the administration of an examination for public employment or licensing.”

Here, the Complainant sought access to Honors Math and Geometry tests, quizzes, and/or exams during the 2014-2015 school year. The Custodian denied access under N.J.S.A. 47:1A-1.1 and EO 9, as well as the possibility that disclosure would jeopardize the security and confidentiality of exam process. As part of the SOI, the Custodian also added that the tests were exempt under a proposed DOE regulation, EO 26, and the ACD exemption. In a rebuttal to the SOI, the Complainant contended that the test exemption in OPRA only applied to higher education.

Regarding the exemption to “test questions, scoring keys and other examination data,” in N.J.S.A. 47:1A-1.1, the GRC notes that this exemption does not apply to the records sought here. This exemption applies strictly to “any public institution of higher education;” however, the records at issue in this complaint are secondary school education records. Further, the Custodian’s citation to EO 26 is equally misplaced because the exemption for “test questions . . . and other examination data” is specific to “public employment or licensing.” Id. Finally, the Custodian’s reliance on 34 N.J.R. 2224(a) (July 11, 2002), a proposed DOE regulation is misplaced. The Appellate Division has already determined that State agency’s proposed OPRA regulations developed in accordance with Executive Order No. 21 (Gov. McGreevey, 2002) could not be relied upon unless promulgated. Slaughter v. Gov’t Records Council, 413 N.J. Super. 544, 554-555 (App. Div. 2010). The GRC has found no evidence that the above cited proposed regulation was ever promulgated. Thus, the only remaining exemptions to address are EO 9 and the ACD exemption.

Regarding EO 9, the executive order provides that “questions on examinations required to be conducted by any State or local government agency” are exempt from disclosure. Id. Unlike the test exemption in EO 26, this exemption is more broadly applicable to tests administered by “any” State or local governmental agencies. By OPRA’s definition of a “public agency,” the School Board is obviously considered a local governmental agency. N.J.S.A. 47:1A-1.1. Thus, it is possible that EO 9, which was left in effect most recently by EO 26, could exempt access to the responsive tests. However, the applicability of EO 9 hinges on whether the requested tests, quizzes, and/or exams are “required to be conducted . . .”

To this end, NJDOE regulations require boards of education to follow its regulations regarding curriculum and instruction. In N.J.A.C. 6A:8-31, NJDOE sets forth a number of

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<sup>7</sup> EO 9 remains in effect as stated in Executive Order No. 21 (Gov. McGreevey, 2002) and EO 26.

provisions on how a board of education must administer its curriculum to ensure that teachers and students are conforming with the New Jersey Student Learning Standards. Id. at (a). As part of these provisions boards of education are required to “provide the time and resources to develop, review, and enhance . . . instructional tools for helping students acquire required knowledge and skills” to include “benchmark assessments . . .” Id. at (c)(3)(iii).

When reading NJDOE’s regulation in tandem with EO 9, it is clear that NJDOE’s regulations require boards of education to provide for certain curricula tools for student achievement, including tests and quizzes proffered to students as benchmark assessments. For this reason, the GRC is satisfied that the requested quizzes and tests, regardless of whether they were proffered prior to submission of the OPRA request, are exempt from disclosure under OPRA in accordance with EO 9.

Accordingly, the requested tests and quizzes are exempt from disclosure under OPRA pursuant to EO 9 because NJDOE’s regulations require boards of education to administer them as “benchmark assessments.” N.J.A.C. 6A:8-3.1(c)(3)(iii). Thus, the Custodian lawfully denied access to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. Further, because the records are exempt under EO 9, the GRC declines to address whether the ACD exemption also applied to them.

### **Conclusions and Recommendations**

The Council Staff respectfully recommends the Council find that the requested tests and quizzes are exempt from disclosure under OPRA pursuant to Executive Order No. 9 (Gov. Hughes, 1963) because New Jersey Department of Education’s regulations require boards of education to administer them as “benchmark assessments.” N.J.A.C. 6A:8-3.1(c)(3)(iii). Thus, the Custodian lawfully denied access to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. Further, because the records are exempt under Executive Order No. 9 (Gov. Hughes, 1963), the GRC declines to address whether the “inter-agency or intra-agency advisory, consultative, or deliberative material” exemption also applied to them.

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

May 15, 2018