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**

**August 24, 2021 Government Records Council Meeting**

Micaela P. Bennett
Complainant
v.
West Orange Board of Education (Essex)
Custodian of Record

Complaint No. 2018-209

At the August 24, 2021 public meeting, the Government Records Council ("Council") considered the August 17, 2021 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that the Council should adopt the Honorable Barry E. Moscowitz's, Administrative Law Judge, findings concluding that "[the Complainant's] motion to disqualify Cleary, Giacobbe from representing [WOBOE] in this case is **DENIED**, that [the Complainant's] motion to compel discovery is likewise **DENIED**, that [WOBOE's] motion for summary decision is **GRANTED**, and that this case is hereby **DISMISSED**." Thus, the Council should adopt the Initial Decision and dismiss this complaint accordingly.

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

Final Decision Rendered by the
Government Records Council
On The 24th Day of August 2021

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 25, 2021**

**STATE OF NEW JERSEY**
**GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director**
**August 24, 2021 Council Meeting**

**Micaela P. Bennett**[1] **GRC Complaint No. 2018-209**
**Complainant**

**v.**

**West Orange Board of Education (Essex)**[2]
**Custodial Agency**

**Records Relevant to Complaint:** Electronic copies of the investigative report, findings, and recommendations by Chiesa, Shahinian & Giantomasi (redacted to protect privacy).

**Custodian of Record:** John Calavano
**Request Received by Custodian:** September 13, 2018
**Response Made by Custodian:** September 18, 2018
**GRC Complaint Received:** September 25, 2018

## Background

April 30, 2019 Council Meeting:

At its April 30, 2019 public meeting, the Council considered the April 23, 2019 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. This complaint should thus be referred to the Office of Administrative Law for a determination on the Complainant's objection to representation and appropriate action as applicable. N.J.A.C. 5:105-1, *et seq*.; N.J.A.C. 1:1-5.3.

2. For the purpose of efficacy, this complaint should be referred to the Office of Administrative Law for a determination as to whether the Custodian unlawfully denied access to the responsive report. N.J.S.A. 47:1A-6. Should the OAL find that an unlawful denial of access occurred, it shall order disclosure and determine whether the Custodian knowing and willfully denied access to same.

[1] No legal representation listed on record.
[2] Represented by Bradley D. Tishman, Esq. of Cleary, Giacobbe, Alfieri, Jacobs, LLC (Oakland, NJ).

Procedural History:

On May 2, 2019, the Council distributed its Interim Order to all parties. On July 16, 2019, this complaint was transmitted to the Office of Administrative Law ("OAL"). On August 2, 2021, the Honorable Barry E. Moscowitz, Administrative Law Judge ("ALJ") issued an Initial Decision[3] as follows:

> I **ORDER** that [the Complainant's] motion to disqualify Cleary, Giacobbe from representing [West Orange Board of Education ("WOBOE")] in this case is **DENIED**, that [WOBOE's] motion to compel discovery is likewise **DENIED**, that [WOBOE's] motion for summary decision is **GRANTED**, and that this case is hereby **DISMISSED**.
>
> [Id. at 16.][4]

## Analysis

### Administrative Law Judge's Initial Decision

The ALJ's findings of fact are entitled to deference from the Council because they are based upon the ALJ's determination of the credibility of the parties. "The reason for the rule is that the administrative law judge, as a finder of fact, has the greatest opportunity to observe the demeanor of the involved witnesses and, consequently, is better qualified to judge their credibility." In the Matter of the Tenure Hearing of Tyler, 236 N.J. Super. 478, 485 (App. Div. 1989), certif. denied 121 N.J. 615 (1990). The Appellate Division affirmed this principle, underscoring that, "under existing law, the [reviewing agency] must recognize and give due weight to the ALJ's unique position and ability to make demeanor-based judgments." Whasun Lee v. Bd. of Educ. of the Twp. of Holmdel, Docket No. A-5978-98T2 (App. Div. 2000), slip op. at 14. "When such a record, involving lay witnesses, can support more than one factual finding, it is the ALJ's credibility findings that control, unless they are arbitrary or not based on sufficient credible evidence in the record as a whole." Cavalieri v. Bd. of Tr. of Pub. Emp. Ret. Sys., 368 N.J. Super. 527, 537 (App. Div. 2004).

The ultimate determination of the agency and the ALJ's recommendations must be accompanied by basic findings of fact sufficient to support them. State, Dep't of Health v. Tegnazian, 194 N.J. Super. 435, 442-43 (App. Div. 1984). The purpose of such findings "is to enable a reviewing court to conduct an intelligent review of the administrative decision and determine if the facts upon which the order is grounded afford a reasonable basis therefor." Id. at 443. Additionally, the sufficiency of evidence "must take into account whatever in the record fairly detracts from its weight"; the test is not for the courts to read only one side of the case and, if they find any evidence there, the action is to be sustained and the record to the contrary is to be ignored (citation omitted). St. Vincent's Hosp. v. Finley, 154 N.J. Super. 24, 31 (App. Div. 1977).

[3] On September 25, 2019, the OAL sent this complaint back to the GRC for "Failure to Appear." Based on the Complainant's explanation, the GRC re-transmitted this complaint back to the OAL on October 18, 2019.

[4] Neither party field exceptions within thirteen (13) days as required by N.J.A.C. 52:14B-10.

In the instant complaint, the ALJ issued an Initial Decision on August 2, 2021. The ALJ, after fairly summarizing the submissions and evidence, and explaining how he weighed the proofs before him and why he credited, or discredited, certain evidence, stated:

> In this case, no evident conflict of interest nor apparent ethics violation exists. In fact, the GRC has expressly stated that counsel can draft the denial. As such, I lack the authority to order Cleary, Giacobbe to withdraw as counsel in this case. Moreover, [the Complainant] has not demonstrated the compromise of any standard that would outweigh the right of respondent to choose its counsel. Therefore, I **CONCLUDE** that [the Complainant] has not carried her burden for Cleary, Giacobbe to be disqualified from representing [WOBOE] in this case, and that WOBOE is entitled to summary judgment on this issue as a matter of law.
>
> ***
>
> [T]he requested record is from independent counsel hired to investigate and report on a specific matter, namely, alleged employee misconduct, which ultimately led to the resignation of the employee. As the above discussion explains, such a record is attorney work product and deliberative-process materials, excluded from the definition of government records under OPRA and shielded by the attorney-client and deliberative-process privileges. Moreover, the report is expressly excluded from disclosure by OPRA as a personnel record. Therefore, I **CONCLUDE**, based on the clear-cut authority and ample caselaw, that access to the investigative report petitioner seeks in this case was properly denied by the custodian of records.
>
> ***
>
> Having concluded that the denial of the investigative report was proper, I need not address the motion to compel discovery, but I will address it nonetheless for the sake of completeness.
>
> As a plain reading of the document demand reveals, it is overbroad because it subsumes documents pertaining not only to this case, but also to other cases. The likelihood also exists that such requested documents would contain confidential information—protected by the attorney-client privilege and the attorney-work-product doctrine—but only an *in camera* review could confirm that suspicion. Nevertheless, the document demand as currently constituted is overbroad. Therefore, I **CONCLUDE** that the objection to the document demand is proper.
>
> Regarding the request for admissions, including the question about who authored the denial, the fact remains that the answer to the question is irrelevant to this case. Again, the factual issue of who wrote the denial is immaterial, as the law permits Cleary, Giacobbe to have written it. Whether Cleary, Giacobbe did write it, which [the Complainant] believes it did, is the gravamen of her complaint, but it is nonetheless permissible by law, and under the circumstances of this case, [the

Complainant] is simply not entitled to know. Therefore, I **CONCLUDE** that the admissions to the requests propounded during discovery need not be compelled.

[Id. at 11-12; 14; 15-16.]

Based on the forgoing analysis, the ALJ ". . . **ORDER[ED]** that [the Complainant's] motion to disqualify Cleary, Giacobbe from representing [WOBOE] in this case is **DENIED**, that [the Complainant's] motion to compel discovery is likewise **DENIED**, that [WOBOE's] motion for summary decision is **GRANTED**, and that this case is hereby **DISMISSED**." [Id. at 16.]

The ALJ's conclusions are clearly aligned and consistent with the aforementioned credibility determinations set forth in his lengthy Initial Decision. As such, the GRC is satisfied that it can ascertain which statements the ALJ accepted as fact, and further, finds that those facts provide a reasonable basis for the ALJ's conclusions.

Therefore, the Council should adopt the ALJ's findings concluding that "[the Complainant's] motion to disqualify Cleary, Giacobbe from representing [WOBOE] in this case is **DENIED**, that [the Complainant's] motion to compel discovery is likewise **DENIED**, that [WOBOE's] motion for summary decision is **GRANTED**, and that this case is hereby **DISMISSED**." Thus, the Council should adopt the Initial Decision and dismiss this complaint accordingly.

In closing, on August 22, 2021 Complainant's Counsel filed a motion to reopen this complaint in accordance with N.J.A.C. 1:1-18.5.[5] Counsel requested that the complaint be referred back to the OAL and in the "interest of justice" due to his inability to submit an argument regarding disclosure of the responsive report. Counsel certified that this inability was the result of several personal circumstances causing a catastrophic effect on his ability to represent the Complainant. While the GRC is certainly sympathetic the circumstances presented by Counsel, said request to reopen the complaint is denied. The ALJ's decision reasonably addresses all issues and Complainant Counsel's submission is an attempt to file exceptions out of time. Further, Counsel's failure to seek relief from the OAL while this complaint was pending an Initial Decision[6] does not impact the Council's ability to review and adopt the ALJ's well-reasoned and thorough Initial Decision.

## Conclusions and Recommendations

The Executive Director respectfully recommends the Council should adopt the Honorable Barry E. Moscowitz's, Administrative Law Judge, findings concluding that "[the Complainant's] motion to disqualify Cleary, Giacobbe from representing [WOBOE] in this case is **DENIED**, that

[5] This filing is notwithstanding the GRC notifying the parties via e-mail on August 20, 2021 that it would not postpone this adjudication nor would it accept any additional submissions per an August 17, 2021 e-mail to the parties advising of the scheduling of this complaint.

[6] The GRC notes that Complainant's Counsel admitted that in his certificate that contacted other judges regarding his personal situation, but failed to contact the OAL regarding this complaint. This is notwithstanding that Counsel submitted a brief to the OAL on June 28, 2021 and noted that the Complainant had "nothing further to add unless further required by the Court."

[the Complainant's] motion to compel discovery is likewise **DENIED**, that [WOBOE's] motion for summary decision is **GRANTED**, and that this case is hereby **DISMISSED**." Thus, the Council should adopt the Initial Decision and dismiss this complaint accordingly.

Prepared By: Frank F. Caruso
Executive Director

August 17, 2021

*State of New Jersey*
OFFICE OF ADMINISTRATIVE LAW

**INITIAL DECISION**
OAL DKT. NO. GRC 15289-19
AGENCY DKT. NO. 2018-209

**MICAELA P. BENNETT,**
Petitioner,
v.
**WEST ORANGE BOARD OF EDUCATION (ESSEX),**
Respondent.

---

**Donald M. Doherty**, Esq., for petitioner

**Bradley D. Tishman**, Esq., for respondent (Cleary, Giacobbe, Alfieri, Jacobs, LLC, attorneys)

Record Closed: August 2, 2021 Decided: August 2, 2021

BEFORE **BARRY E. MOSCOWITZ**, ALJ:

## STATEMENT OF THE CASE

On September 12, 2018, petitioner, Micaela Bennett, requested an investigative report of employee conduct from respondent, the West Orange Board of Education, under the Open Public Records Act (OPRA). On September 18, 2018, the custodian of records denied the request. Should Cleary Giacobbe be disqualified from this case if it drafted

the denial? No. Counsel may draft denials for custodians, see Loigman v. Twp. of Middletown, Custodian of Record (Monmouth), GRC Complaint No. 2004-165 (May 2005), and investigative reports of employee conduct are specifically exempt from disclosure, see Fenichel v. City of Ocean City (Cape May), GRC Complaint No. 2009-71 (November 2009).

## PROCEDURAL HISTORY

On September 12, 2018, petitioner submitted a request to respondent under OPRA. On September 18, 2018, the custodian of records denied the request. On September 25, 2018, petitioner filed a Denial of Access Complaint with the Government Records Council (GRC).

On October 5, 2018, petitioner objected to Cleary Giacobbe, which is general counsel to respondent, representing respondent.

On April 30, 2019, Council Staff concluded that this complaint should be referred to the OAL for determination, and on October 25, 2019, the GRC transmitted the case to the OAL as a contested case under the Administrative Procedure Act, N.J.S.A. 52:14B-1 to -15, and the act establishing the OAL, N.J.S.A. 52:14F-1 to -23, for a hearing under the Uniform Administrative Procedure Rules, N.J.A.C. 1:1-1.1 to -21.6.

On November 6, 2020, petitioner filed a motion to compel discovery and to disqualify Cleary Giacobbe from representing respondent in this case.

On November 16, 2020, I held a telephone conference call to discuss the motion and the parties agreed to a briefing schedule. The parties also agreed that no genuine issue of material fact exists concerning whether Cleary Giacobbe should be disqualified from representing respondent and whether the custodian of records unlawfully denied petitioner the investigative report she seeks, that is, whether the report is exempt from disclosure under OPRA, and that these determinations could be made as a matter of law. As a result, time was scheduled for respondent to oppose the motions concerning

discovery and disqualification and to file its own motion for summary decision concerning the denial of the report.

lOn December 11, 2020, respondent filed its opposition to petitioner's motion to compel discovery and to disqualify Cleary Giacobbe from representing respondent in this case, together with its motion for summary decision concerning the denial of the report. On June 28, 2021, petitioner filed her reply to the opposition to her motion concerning discovery and disqualification, but she did not oppose respondent's motion for summary decision concerning the denial of the report, so time was extended for petitioner to do so. On July 1, 2021, petitioner stated that she would oppose respondent's motion within the week but did not do so. To date, petitioner has still not done so. Nevertheless, petitioner has addressed the issue concerning the denial of the report in other filings, so I will consider respondent's motion for summary decision as opposed.

## FINDINGS OF FACT

Based on the papers submitted in support of and in opposition to the motions detailed above, I **FIND** the following as **FACT** for purposes of these motions only:

On September 12, 2018, petitioner submitted a request to respondent under OPRA. The request was for a copy of "the investigative report, findings, and recommendations by Chiesa, Shahinian & Giantomasi , [PC]." Chiesa Shahinian had been retained by respondent as special counsel to conduct an investigation of certain representations the former superintendent of schools made in his application for employment. Ultimately, the superintendent resigned under a Separation of Employment Agreement dated October 19, 2018. The agreement was later approved by the Commissioner of Education, and respondent subsequently provided a copy of that agreement and resignation to petitioner on November 2, 2018.

Meanwhile, on September 18, 2018, the custodian of records denied the request for the investigative report by special counsel, Chiesa Shahinian. In his letter denying the request, the custodian asserted that the request was denied because the request concerned "personnel records," which the custodian further asserted are exempt under

OPRA. The custodian wrote, "It is well established that a confidential internal investigation of employee conduct is exempt from disclosure as a personnel record." In addition, the custodian asserted that the request was denied because the request concerned records protected by the attorney-client privilege and the attorney-work-product doctrine. As a result, the custodian deemed the request answered and the matter closed.

On September 25, 2018, petitioner filed a complaint with the GRC.

On October 5, 2018, petitioner objected to Cleary Giacobbe, which is general counsel to respondent, representing respondent. She asserted that Cleary Giacobbe drafted the response for the custodian of records, which made Cleary Giacobbe a "material witness" and created "a conflict of interest." Petitioner wrote, "[Cleary Giacobbe] is essentially the actual OPRA custodian with [the custodian] the strawman in the transaction . . . [and] it would be improper for [Cleary Giacobbe] to represent [respondent] due to the inherent conflict that exists in the discharge of OPRA custodian duties."

On October 24, 2018, Cleary Giacobbe provided a detailed response about why it could represent respondent. Of note, Cleary Giacobbe asserted that it did not participate in the investigation of the alleged misconduct or in the preparation of the report about that alleged misconduct, and that this case involves a purely legal issue, namely, whether the investigative report is exempt under OPRA. Moreover, Cleary Giacobbe asserted that any potential testimony at a hearing would come from the custodian of records himself, John Calavano. Finally, Cleary Giacobbe wrote, "If the [GRC] consider[s] disqualifying our firm, going forward it must disqualify law firms that provide legal advice to record custodians in responding to OPRA requests . . . in every case."

On April 30, 2019, Council Staff issued their findings and recommendations. In their analysis, Council Staff reasoned that the threshold determination of representation is best determined in the context of an administrative hearing. Accordingly, Council Staff concluded that this complaint should be referred to the OAL for determination.

Likewise, Council Staff reasoned that for efficacy, the OAL should also determine whether the custodian unlawfully denied petitioner the investigative report she seeks, that is, whether the report is exempt under OPRA, and if so, whether the denial of the request was knowing and willful.

On that same date, the GRC adopted the findings and recommendations of Council Staff and issued an Interim Order referring the complaint to the OAL.

On October 25, 2019, the GRC transmitted the case to the OAL for hearing, and the above motions ensued.

Regarding the discovery, petitioner served requests for documents and requests for admissions, and in her motion to compel discovery, petitioner seeks certain documents and certain admissions. More specifically, in her requests for documents, petitioner seeks "all documents, including emails and any attachments thereto, sent or received between either of the Defendants [sic] (or their assistants or representatives) and the Clearly Giacobbe Alfieri Jacobs, LLC law firm or any of its personnel between 9/12/18 and 9/19/18." In her requests for admissions, petitioner seeks an admission that Cleary Giacobbe drafted the denial letter and determined the basis of that denial. Likewise, petitioner seeks an admission that the custodian of records did not determine the basis of the denial.

## CONCLUSIONS OF LAW

### I.

A party may move for summary decision upon all or any of the substantive issues in a contested case. N.J.A.C. 1:1-12.5(a). Summary decision may be rendered if the papers and discovery that have been filed, together with the affidavits, if any, show that no genuine issue of material fact exists, and that the moving party is entitled to prevail as a matter of law. N.J.A.C. 1:1-12.5(b). When motions for summary decision are made and supported, an adverse party, to prevail, must respond by affidavit setting forth specific

facts showing that genuine issues of fact exist that can only be determined in an evidentiary proceeding. Ibid.

In this case, the parties agree that no genuine issues of material fact exist concerning the legal issues in this case, and that the issues set forth above can be determined as a matter of law.

In the sections that follow, I will address each legal issue in turn, beginning with the legal issue concerning disqualification, followed by the legal issue of exemption, and finally by the legal issue concerning discovery.

A.

First, petitioner argues that counsel cannot draft denials unless they serve as custodians. Petitioner clarifies that she is not arguing that counsel cannot provide legal advice, only that custodians cannot abdicate their responsibility for responding to the requests: "To allow counsel to draft the response . . . usurps the role and function the [L]egislature has designated to the . . . custodian." In support of her claim that Cleary Giacobbe drafted the denial, petitioner writes, "The legalese and formal legal citation clearly convey that the records custodian has 'lawyered up.'" Petitioner also implies that such legalese and formal citation confused and intimidated her, which petitioner believes contravenes OPRA itself.

Second, petitioner argues that Cleary Giacobbe, in drafting the denial, that is, in "ghostwriting" it, engaged not only in "shenanigans" in violation of ACPE Opinion 713, but also in the "unauthorized practice of law" in violation of R. 1:21-1.

Third, petitioner argues that Cleary Giacobbe, in drafting the denial, created an impermissible conflict of interest. In support of her claim, petitioner cites some of the statutory provisions of OPRA delineating some of the obligations of the custodian. In addition, petitioner notes that OPRA does not expressly state that a custodian can delegate this responsibility. Moreover, petitioner cites RPC 1.7, implying that Cleary

Giacobbe, in drafting the denial, has exposed its client to counsel fees and the custodian to civil penalties, should petitioner succeed in this case.

Finally, petitioner argues that Cleary Giacobbe, in drafting the denial, cannot be objective about its "legal advice or administrative decisions" in litigating this case. In support of her claim, petitioner cites In re Advisory Committee on Professional Ethics, 162 N.J. 497 (2000). In that case, an attorney for a municipality sought an advisory opinion about whether he could also serve as the clerk-administrator for the municipality, and the Advisory Committee determined that he could not because it might undermine his ability to bring independent judgment in the evaluation of his role as clerk-administrator. According to petitioner, the circumstances here are no different.

As a result, petitioner seeks, as a threshold issue, the disqualification of Cleary Giacobbe from this case. From there, petitioner seeks the answer to her question, as subsumed in both her Requests for Documents and Requests for Admissions, "Who authored the denial?"

Although petitioner did not argue in her motion that Cleary Giacobbe, in drafting the denial, is a material witness in this case, creating an impermissible conflict of interest, she did assert this claim in her email to the GRC dated October 5, 2019, objecting to Cleary Giacobbe representing respondent in this case.

B.

Cleary Giacobbe argues in opposition that as general counsel to respondent, it provides legal advice on many matters, including matters concerning OPRA; that no conflict of interest exists because its interests and the interest of respondent are aligned; and that it did not, above all, participate in the investigation or preparation of the investigative report petitioner seeks. Second, Cleary Giacobbe argues that this case concerns legal issues, not factual ones, and that no testimony is needed. Moreover, Cleary Giacobbe argues that if testimony is needed, the only testimony that would be needed would be from the custodian of records, Calavano, not from Cleary Giacobbe. Finally, Cleary Giacobbe argues that any questions that petitioner would ask of it would

be protected by the attorney-client privilege. Indeed, Cleary Giacobbe posits what petitioner portends for the future:

> If our firm is disqualified, going forward every law firm that provides legal advice to records custodians in responding to OPRA requests would be disqualified from representing said public entities upon the submission of a legal challenge in every case. Thus, [respondent's] choice of counsel to litigate this matter must be respected.
>
> [Resp't's Br., dated December 11, 2020, at 4.]

C.

To begin, the GRC has long concluded that it does not have jurisdiction to regulate how custodians use counsel in response to record requests, Loigman v. Twp. of Middletown, Custodian of Record (Monmouth), GRC Complaint No. 2004-165 (May 2005), which is a decision the GRC had rendered in response to the very argument petitioner makes in this case about Cleary Giacobbe having "usurped" the authority of the records custodian:

> The complainant raises a concern about the authority of the records Custodian being usurped by the Custodian's counsel in matters pertaining to records requests. The Custodian of Records has the right to manage records requests and defer to counsel for any issues arising from a records request. OPRA does not give the GRC the authority to govern how a Custodian internally handles records requests.
>
> Pursuant to N.J.S.A. 47:1A-7(b), which delineates the Council's powers and duties, the GRC does not have jurisdiction to regulate how a Custodian utilizes its counsel in its response to a records request.
>
> [Ibid.]

In fact, the GRC underscored this determination more recently, when it stated (coincidently, regarding this respondent, this custodian, and this superintendent, who is the subject of this request) that neither OPRA nor the GRC have the authority to direct

how a party uses legal counsel for OPRA requests—at any point during the statutory process:

> The GRC begins by briefly addressing the Complainant's contention that Custodian's use of Counsel here amounted to a knowing and willful violation. OPRA does not prohibit a party from utilizing legal counsel at any point during the statutory process. For this reason, whether a custodian seeks assistance from legal counsel in responding to an OPRA request or Denial of Access Complaint is of no moment. Simply put, OPRA and the GRC have no authority to direct how a party utilizes legal counsel. N.J.S.A. 47:1A-7.
>
> [Volscho v. W. Orange Bd. of Educ. (Essex), GRC Complaint No. 2018-205, at 1 (May 19, 2020).]

Thus, the GRC has made its position known on this issue: A custodian can seek assistance from counsel in responding to an OPRA request at any point of the process—and the GRC has no authority to dictate how a custodian can use that counsel.

Petitioner's implication that the legalese and formal citations contained in the denial confused and intimidated her, and her belief that such legalese and formal citations contravene OPRA, are arguments that are undeveloped. They are also spurious. Indeed, the remainder of petitioner's arguments are likewise unsupported.

First, petitioner cites no provision from OPRA that would prevent Cleary Giacobbe from drafting the denial. To the contrary, petitioner asserts that the absence of such a provision prohibits Cleary Giacobbe from drafting the denial. In short, neither interpretive caselaw nor statutory construction supports such an assertion.

Likewise, the Rule of Professional Conduct that petitioner cites, RPC 1.7, Conflict of Interest: General Rule, does not apply. Subsection (a)(1) states that a lawyer shall not represent a client if that representation will be directly adverse to another client, while subsection (a)(2) states that a lawyer shall not represent a client if that representation may be materially limited by the lawyer's responsibilities to another client or to a third person or by the lawyer's own interests. Neither apply on their face.

Moreover, petitioner provides no sound reasoning to support the inference line in her warrant that Cleary Giacobbe, in drafting the denial, has exposed its client to counsel fees and the custodian to civil penalties because that would mean a potential conflict of interest would exist not only in this case, but also in every other case in which an attorney provides counsel to a custodian.

The Rules of Professional Conduct require competence; they do not impose guarantees. As the very first RPC, RPC 1.1, Competence, expressly states, a lawyer shall not handle or neglect a matter in such manner that the lawyer's conduct constitutes gross negligence or exhibit a pattern of negligence or neglect in the lawyer's handling of legal matters generally. To emphasize, it says nothing of guarantees or even negligence. It expressly references gross negligence or a pattern of negligence.

In addition, the Advisory Opinion case that petitioner cites, In re Advisory Committee on Professional Ethics, 162 N.J. 497 (2000), is distinguishable on its face too. In that case, the attorney for the municipality also sought to serve as its clerk-administrator. In this case, Cleary Giacobbe, as general counsel, does not seek to become the custodian of records as well. The firm merely dispenses advice in its capacity as general counsel, just as any attorney would for a client, and may even draft the denial for the custodian, as the GRC permits. Even if Cleary Giacobbe drafted the denial in this case, the assertion has not been made that the firm does so with each and every request, arguably usurping the role of the records custodian, but even then, no prohibition exists that it may not do so, at least not to date.

Parenthetically, the argument that petitioner asserts in her brief, that Cleary Giacobbe has somehow engaged in the unauthorized practice of law in violation of R. 1:1-21, is meritless, as is the argument petitioner asserts in her complaint that Cleary Giacobbe must be disqualified because the firm is a material witness. Even if Cleary Giacobbe, as general counsel for respondent, did draft the denial for respondent, Cleary Giacobbe may do so, as explained above. Thus, this provision of legal services cannot constitute the authorized practice of law.

Further, should any testimony be needed regarding the denial of the report petitioner seeks, such testimony would be provided, in the first instance, by the custodian of records, Calavano.

In addition, any conversation that Calavano had with Cleary Giacobbe would likely be protected by the attorney-client privilege, as respondent further argues in its brief.

Moreover, as the Appellate Division explained in Escobar v. Mazie, 460 N.J. Super. 520, 528–29 (App. Div. 2019), an attorney qualifies as a "necessary witness" only if his or her testimony cannot be obtained elsewhere, and even so, such disqualification is not necessarily imputed to the rest of the firm.

Above all, petitioner carries a heavy burden. As respondent notes, motions to disqualify are disfavored because they are "a harsh discretionary remedy, which must be used sparingly." O Builders & Associates, Inc. v. Yuna Corp. of N.J., 206 N.J. 109, 130 (2011) (quoting Cavallaro v. Jamco Prop. Mgmt., 334 N.J. Super. 557, 572 (App. Div. 2000). Toward this end, tribunals must balance competing interests—"weighing the need to maintain the highest standards of the profession against a client's right freely to chose his counsel." Twenty-First Century Rail Corp. v. N.J. Transit Corp., 210 N.J. 264, 273–74 (2012).

These sentiments are also shared by our federal district court. See Essex Cty. Chem. Corp. v. Hartford Accident & Indem. Co., 975 F. Supp. 650, 653 (D.N.J. 1997); see also Alexander v. Primerica Holdings, Inc., 822 F. Supp. 1099, 1114 (D.N.J. 1993).

Accordingly, "where there is no evident conflict of interest nor apparent ethics violation, a trial judge lacks authority to order counsel to withdraw." Goodwin Motor Corp. v. Mercedes-Benz of North America, Inc., 172 N.J. Super. 263, 274 (App. Div. 1980).

In this case, no evident conflict of interest nor apparent ethics violation exists. In fact, the GRC has expressly stated that counsel can draft the denial. As such, I lack the authority to order Cleary Giacobbe to withdraw as counsel in this case. Moreover, petitioner has not demonstrated the compromise of any standard that would outweigh the

right of respondent to choose its counsel. Therefore, I **CONCLUDE** that petitioner has not carried her burden for Cleary Giacobbe to be disqualified from representing respondent in this case, and that respondent is entitled to summary judgment on this issue as a matter of law.

II.

Regarding the issue of denial, the primary issue in this case, respondent first explained in its letter dated September 18, 2018, that the investigative report petitioner seeks is exempt from disclosure as a personnel record under N.J.S.A. 47:1A-10, and that the nature of the report, an internal investigation of employee conduct, is specifically exempt from disclosure under Fenichel v. City of Ocean City (Cape May), GRC Complaint No. 2009-71 (November 2009). In addition, respondent explained that the report is also shielded from disclosure by the attorney-client privilege and the attorney-work-product doctrine. In its brief, respondent expanded its reasoning with pages of authority, and further argued that the report is also shielded from disclosure under the deliberative-process privilege.

Petitioner, however, disagrees. In her complaint, petitioner argues that the exemption does not apply in this case because the investigative report she seeks concerns alleged misrepresentations the superintendent made on his employment application before he was employed by respondent, which petitioner asserts renders Fenichel inapposite. In addition, petitioner argues that the investigative report is not exempt under the attorney-client privilege because Chiesa Shahinian wrote the report and Chiesa Shahinian does not represent respondent. Moreover, petitioner argues that New Jersey courts have long held that the attorney-client privilege does not apply to reports of law firms hired to perform investigations.

I disagree. A plain reading of the statute, bolstered by several cases, supports the denial of the investigative report petitioner seeks. First, the statute, N.J.S.A. 47:1A-10, expressly states that personnel records, including, but not limited to, records related to grievances, shall not be considered government records, and they shall not be made available for public access. Meanwhile, none of the exceptions apply:

> 47:1A-10. Personnel, pension records not considered public information; exceptions
>
> Notwithstanding the provisions of P.L. 1963, c. 73 (C. 47:1A-1 et seq.) or any other law to the contrary, the personnel or pension records of any individual in the possession of a public agency, including but not limited to records relating to any grievance filed by or against an individual, shall not be considered a government record and shall not be made available for public access, except that:
>
> an individual's name, title, position, salary, payroll record, length of service, date of separation and the reason therefor, and the amount and type of any pension received shall be a government record;
>
> personnel or pension records of any individual shall be accessible when required to be disclosed by another law, when disclosure is essential to the performance of official duties of a person duly authorized by this State or the United States, or when authorized by an individual in interest; and
>
> data contained in information which disclose conformity with specific experiential, educational or medical qualifications required for government employment or for receipt of a public pension, but not including any detailed medical or psychological information, shall be a government record.

Second, the GRC specifically includes in its exclusion to the definition of government record, internal investigations of employee misconduct, which the Appellate Division has affirmed. See In re Attorney General Law Enf't Directive Nos. 2020-5 & 2020-6, 465 N.J. Super. 111, 139–40 (App. Div. 2020) (citing Libertarians for Transparent Gov't v. Cumberland Cty., 465 N.J. Super. 11, 13, 20–21 (App. Div. 2020) (where the Appellate Division held that a public employee's internal disciplinary records, including "a settlement agreement resolving an internal disciplinary action," are not "government records" under OPRA but "personnel record[s] exempt from disclosure" under the statute); see also Gonzalez v. Cty. of Hudson (Hudson County), GRC Complaint No. 2011-212 (2012) (where the GRC concluded that "the complete investigative report generated by [an] outside law firm" is exempt from disclosure under N.J.S.A. 47:1A-10). Moreover, as respondent noted, an internal investigation of employee conduct is specifically excepted from disclosure. Fenichel v. City of Ocean City (Cape May), GRC

Complaint No. 2009-71 (November 2009) (where the GRC concluded that "records involving employee discipline or investigations into employee misconduct are properly classified as personnel records within the exemption from disclosure" under N.J.S.A. 47:1A-10).

Third, such internal investigations of employee misconduct are also likely excluded under the attorney-client privilege. See, e.g., Mulero v. Town of Morristown Custodian of Records, GRC Complaint No. 2005-57 (September 2005) (where the requested record was from "independent counsel hired to investigate and report on a specific matter," and the GRC concluded that it was a record within the attorney-client privilege, which is not included in the definition of "government record" under N.J.S.A. 47:1A-1.1).

To be sure, N.J.S.A. 47:1A-1.1 specifically excludes "confidential information" from its definition of "government record," including "any record within the attorney-client privilege," which N.J.S.A. 47:1A-9(b) expressly safeguards, and which our Supreme Court decidedly reinforced in O'Boyle v. Borough of Longport, 218 N.J. 168, 185 (2014), when it wrote, "The attorney-client privilege is a recognized privilege that may shield documents that otherwise meet the OPRA definition of government record from inspection or production."

Work product is likewise excluded from the definition of government record, id. at 188, as is deliberative material, id. at 184.

In this case, the requested record is from independent counsel hired to investigate and report on a specific matter, namely, alleged employee misconduct, which ultimately led to the resignation of the employee. As the above discussion explains, such a record is attorney work product and deliberative-process materials, excluded from the definition of government records under OPRA and shielded by the attorney-client and deliberative-process privileges. Moreover, the report is expressly excluded from disclosure by OPRA as a personnel record. Therefore, I **CONCLUDE**, based on the clear-cut authority and ample caselaw, that access to the investigative report petitioner seeks in this case was properly denied by the custodian of records.

III.

Having concluded that the denial of the investigative report was proper, I need not address the motion to compel discovery, but I will address it nonetheless for the sake of completeness.

Regarding the motion to compel discovery, beginning with the request for admissions, petitioner argues that the attorney-work-product doctrine only protects documents, not facts, and that petitioner seeks a fact through its request for admissions, not a document, namely, the answer to her question, "Who authored the denial?" Continuing with both the request for admissions and the request for documents, petitioner argues that the attorney-client privilege does not apply because respondent waived the privilege when respondent issued the denial letter. Finally, petitioner complains that respondent did not even provide a Vaughn index.

Respondent argues in opposition to the motion to compel discovery that its objections to the discovery requests were proper. First, respondent asserts that the documents petitioner seeks during discovery are protected by the attorney-client privilege and the attorney-work-product doctrine. Second, respondent asserts that its objection to the document demand, "all documents, including emails and any attachments thereto, sent or received between either of the Defendants [sic] (or their assistants or representatives) and the Clearly Giacobbe Alfieri Jacobs, LLC law firm or any of its personnel between 9/12/18 and 9/19/18," was proper because the document demand is "overbroad, ambiguous, unduly burdensome, and seek[ing] confidential, irrelevant, and immaterial information."

I agree. As a plain reading of the document demand reveals, it is overbroad because it subsumes documents pertaining not only to this case, but also to other cases. The likelihood also exists that such requested documents would contain confidential information—protected by the attorney-client privilege and the attorney-work-product doctrine—but only an *in camera* review could confirm that suspicion. Nevertheless, the document demand as currently constituted is overbroad. Therefore, I **CONCLUDE** that the objection to the document demand is proper.

Regarding the request for admissions, including the question about who authored the denial, the fact remains that the answer to the question is irrelevant to this case. Again, the factual issue of who wrote the denial is immaterial, as the law permits Cleary Giacobbe to have written it. Whether Cleary Giacobbe did write it, which petitioner believes it did, is the gravamen of her complaint, but it is nonetheless permissible by law, and under the circumstances of this case, petitioner is simply not entitled to know. Therefore, I **CONCLUDE** that the admissions to the requests propounded during discovery need not be compelled.

## ORDER

Given my findings of fact and conclusions of law, I **ORDER** that petitioner's motion to disqualify Cleary Giacobbe from representing respondent in this case is **DENIED**, that petitioner's motion to compel discovery is likewise **DENIED**, that respondent's motion for summary decision is **GRANTED**, and that this case is hereby **DISMISSED**.

I hereby **FILE** my initial decision with the **GOVERNMENT RECORDS COUNCIL** for consideration.

This recommended decision may be adopted, modified, or rejected by the **GOVERNMENT RECORDS COUNCIL,** which is authorized by law to make a final decision in this case. If the Government Records Council does not adopt, modify, or reject this decision within forty-five days, and unless such time limit is otherwise extended, this recommended decision shall become a final decision under N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **EXECUTIVE DIRECTOR OF THE GOVERNMENT RECORDS COUNCIL, 101 South Broad Street, PO Box 819, Trenton, New Jersey 08625-0819,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

August 2, 2021
DATE

**BARRY E. MOSCOWITZ**, ALJ

Date Received at Agency: August 2, 2021

Date Mailed to Parties: August 2, 2021

dr

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

## April 30, 2019 Government Records Council Meeting

Micaela P. Bennett
Complainant
v.
West Orange Board of Education (Essex)
Custodian of Record

Complaint No. 2018-209

At the April 30, 2019 public meeting, the Government Records Council ("Council") considered the April 23, 2019 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. This complaint should thus be referred to the Office of Administrative Law for a determination on the Complainant's objection to representation and appropriate action as applicable. N.J.A.C. 5:105-1, *et seq.*; N.J.A.C. 1:1-5.3.

2. For the purpose of efficacy, this complaint should be referred to the Office of Administrative Law for a determination as to whether the Custodian unlawfully denied access to the responsive report. N.J.S.A. 47:1A-6. Should the OAL find that an unlawful denial of access occurred, it shall order disclosure and determine whether the Custodian knowing and willfully denied access to same.

Interim Order Rendered by the
Government Records Council
On The 30th Day of April 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: May 2, 2019**

**STATE OF NEW JERSEY**
**GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Council Staff**
**April 30, 2019 Council Meeting**

**Micaela P. Bennett**[1] **GRC Complaint No. 2018-209**
**Complainant**

**v.**

**West Orange Board of Education (Essex)**[2]
**Custodial Agency**

**Records Relevant to Complaint:** Electronic copies of the investigative report, findings, and recommendations by Chiesa, Shahinian & Giantomasi (redacted to protect privacy).

**Custodian of Record:** John Calavano
**Request Received by Custodian:** September 13, 2018
**Response Made by Custodian:** September 18, 2018
**GRC Complaint Received:** September 25, 2018

## Background[3]

Request and Response:

On September 12, 2018, the Complainant submitted an Open Public Records Act ("OPRA") request to the Custodian seeking the above-mentioned records. On September 18, 2018, the Custodian responded in writing denying access to the responsive records as a personnel record. N.J.S.A. 47:1A-10; Fenichel v. City of Ocean City (Cape May), GRC Complaint No. 2009-71 (November 2009). Further, the Custodian denied access to the records on the basis that same were exempt under the attorney-client privilege and attorney work product doctrine. N.J.S.A. 47:1A-1.1; Mulero v. Town of Morristown, GRC Complaint No. 2005-57 (September 2005).

Denial of Access Complaint:

On September 25, 2018, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant disputed the Custodian's denial of access, noting that the responsive records were the result of questions raised by the Superintendent Jeffrey S. Rutzky's "employment history, applications for certifications, applications for employment, and resumes." The Complainant stated that herself and others ("concerned citizens")

[1] No legal representation listed on record.
[2] Represented by Bradley D. Tishman, Esq. of Cleary, Giacobbe, Alfieri, Jacobs, LLC (Oakland, NJ).
[3] The parties may have submitted additional correspondence or made additional statements/assertions in the submissions identified herein. However, the Council includes in the Findings and Recommendations of the Council Staff the submissions necessary and relevant for the adjudication of this complaint.

raised such issues for about the last year, which prompted the West Orange Board of Education ("BOE") to inform the public that it retained an investigator. The Complainant stated that investigators met with the concerned citizens and others, rendered a preliminary report in July 2018, and issued a final report on August 16, 2018.

The Complainant argued that the personnel exemption did not apply here. The Complainant contended that the investigation centered on the Superintendent's alleged misrepresentations and omissions in advance of his employment with the BOE. The Complainant argued that similar to how applications and resumes are not covered as personnel records under OPRA, the records in question address the Superintendent's pre-employment "fraud to induce employment." The Complainant thus contended that Fenichel, GRC 2009-71 was inapposite to the instant complaint.

The Complainant further argued that the records could not be exempt under the attorney-client privilege exemption. The Complainant stated that the BOE was represented by Custodian Counsel's Firm and not Chiesa, Shahinian & Giantomasi ("Special Counsel"). The Complainant argued that New Jersey courts have long-held that no attorney-client privilege applies to attorneys hired to perform an investigation. Payton v. N.J. Turnpike Auth., 148 N.J. 524 558 (1997); Hansen v. Janitschek, 31 N.J. 545 (1960); Palantini v. Sarian, 15 N.J. Super. 34, 41043 (App. Div. 1951) (but see Harding v. Dana Tranport, Inc., 914 F.Supp. 1084, 1091 (D.N.J. 1996)). The Complainant further argued that the attorney-client privilege was not sacrosanct: it could be pierced based on multiple factors. In re: Kozlov, 79 N.J. 232, 242 (1979).

The Complainant contended that the law is clear that the report was subject to disclosure and not attorney-client privileged. The Complainant also argued that OPRA's legislative intent supported disclosure so that the public may be advised of whether the findings were consistent with the purported allegations. The Complainant contended that she believed the Custodian denied access because it supported the conclusions reached by the concerned citizens regarding the Superintendent. The Complainant asserted that some of the report was provided to BOE members prior to voting on the Superintendent's contract. The Complainant also contended exempting access allowed the BOE to avoid public scrutiny.

Supplemental Response:

On September 26, 2018, the Custodian provided a supplemental response to the Complainant. Therein, the Custodian reiterated that the BOE was legally precluded from disclosing the responsive "report" for the reasons advanced in his initial response.

Objections to Representation:

On October 5, 2018, the Complainant objected to Custodian Counsel's representation in this matter. The Complainant asserted that Counsel's Firm drafts OPRA responses for the BOE and is thus a material witness to this complaint. The Complainant noted that the Firm recently stated at a BOE meeting that the Custodian has the final say on disclosure. However, the Complainant asserted that she was informed that the BOE, as a practice, forwarded all OPRA requests to Counsel's Firm for review and response on the Custodian's behalf. The Complainant

argued that the Firm, essentially acting as the "strawman," had inherent conflicts in representing the BOE in this matter.

On October 12, 2018, the Complainant e-mailed the GRC stating that she had not received any response to her representation objections from Counsel. The Complainant requested a determination on her objection for procedural purposes, as the Firm may need to be called as a material witness.

On October 17, 2019, Custodian's Counsel advised that he recently returned from vacation and would respond to the objections "promptly." On the same day, the GRC advised that the if the BOE received the Complainant's objections on October 5, 2018, the final day to respond was October 12, 2018. N.J.A.C. 5:105-2.3(j). The Custodian's Counsel responded that he left prior to October 5, 2018 and requested an extension until October 24, 2018 to respond, which the GRC granted.

Statement of Information:

On October 18, 2019, the Custodian filed a Statement of Information ("SOI"). The Custodian certified that he received the Complainant's OPRA request on September 13, 2018. The Custodian certified that he responded in writing on September 18, 2018 denying the request and supplemented his response on September 26, 2018.

The Custodian certified that the record at issue here was an August 14, 2018 report produced by Special Counsel containing the findings, analysis, and recommendations of an investigation into allegations raised against the Superintendent. The Custodian argued that he lawfully denied access to said report for all the reasons stated in his initial response. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-10.

Response for Objections to Representation:

On October 24, 2018, Custodian's Counsel responded to the Complainant's objection to his representation in this complaint. Counsel contended that the GRC should reject same because it did not conform to N.J.A.C. 5:105-2.3(i). Counsel contended that the Complainant failed to identify the "representative in question" and did not include "a detailed explanation of the reasons" for her objection. Id. at (i)(2) and (i)(3).

Counsel argued that should the GRC find the objections sufficient, the Complainant failed to meet the exceptionally high standard that any attorney within the Firm was a "necessary witness;" thereby amounting representation in case to a violation of the "Rules of Professional Conduct." Counsel argued that the Complainant's arguments were "unfounded and without legal basis."

Counsel first stated that the Firm represented the BOE in a broad variety of matters, inclusive of OPRA matters. Counsel thus stated that his Firm's interests were aligned with the BOE and there are no potential conflicts. Counsel also noted that the BOE obtained Special Counsel to conduct the investigation; the Firm did not participate in investigation or preparation

of the subject report. Counsel thus argued that neither himself nor any employee of the Firm was a "necessary witness" under R.P.C. 3.7.

Second, Counsel argued that the sole issue in this complaint is whether the Custodian unlawfully denied access to the report. Counsel asserted that this is purely a legal issue and not one necessitating testimony. Counsel noted that even if testimony were possible, the Custodian was the only individual who could rightly perform this task. Counsel contended that if the GRC were to disqualify the Firm here, it would be required to disqualify every firm that provided legal advice to custodians in responding to OPRA requests.

Counsel finally stated that to disqualify himself or the Firm, the GRC must "balance competing interests, weighing the need to maintain the highest standards of the profession against the client's right to freely choose his counsel." See Stengart v. Loving Care Agency, Inc., 201 N.J. 300, 327 (2010) (Citation and internal quotations omitted). Counsel further averred that the courts have held that objection applications should be viewed in an unfavorable light and disqualification a drastic remedy. Essex Chemical Corp. v. Hartford Accident & Indemnity, Co., 975 F.Supp. 650, 653 (D.N.J. 1997). See also Goodwin Motor Corp. v. Mercedes-Benz of North America, Inc., 172 N.J. Super. 263, 274 (App. Div. 1980) (holding that where no apparent conflict of interest or apparent ethics violation exists, "a trial judge lacks authority to order counsel to withdraw.").

Counsel contended that no reasons for such a "drastic remedy" exists in this complaint. Counsel further contended that the Complainant failed to meet her heavy burden that disqualification is warranted. Counsel contended that greater harm to the BOE would occur here; the Complainant already presented her case with no need to call the Firm as a witness. Counsel argued the dispute here is purely legal and not factual in any way. Counsel also questioned the Complainant's allegations given the straightforward nature of this complaint. Counsel asserted that this is especially true given that the Complainant cannot force himself or the Firm to testify on attorney-client privileged communications. N.J.S.A. 2A:84A-20; N.J.R.E. 504; Fellerman v. Bradley, 99 N.J. 493, 499 (1985).

Finally, Counsel contended that even assuming that he was somehow a "necessary witness" here, the Firm would not be precluded from representing the BOE. R.P.C. 3.7; Main Events Productions v. Lacy, 220 F.Supp. 2d 353 (D.N.J. 2002); J.G. Ries & Sons, Inc. v. Spectraserv, Inc., 384 N.J. Super. 216, 230 (App. Div. 2006). Counsel stated that in Oswell v. Morgan Stanley Dean Witter & Co., 2007 WL 2446529 (D.N.J. 2007), the court held that a witness was not "'truly necessary' if there are no documents or other witnesses that can be used to introduce the relevant evidence." Counsel stated that the court thus concluded that "where knowledge possessed by an attorney is equally possessed by other witnesses, disqualification is not appropriate." Id. Counsel thus contended that foregoing supports that the Firm could not be disqualified here.[4]

[4] The Complainant subsequently requested an opportunity to respond to Counsel's October 24, 2018 letter. The GRC advised that its regulations do not afford a sur-response to same and noted that it would review both submissions and "advise the parties accordingly." Notwithstanding, the Complainant submitted a sur-response via e-mail on October 25, 2018.

## Analysis

### Objections to Representation

The Administrative Procedures Act ("APA" or "the Act"), N.J.S.A. 52:14B-1 to -31, establishes the process and procedures by which administrative agencies carry out their regulatory functions. Administrative agencies possess wide latitude [under the Act] in selecting the appropriate procedures to effectuate their regulatory duties and statutory goals." St. Barnabas Medical Center v. N.J. Hosp. Rate Setting Comm'n, 250 N.J. Super. 132, 142 (App. Div. 1991); Metromedia, Inc. v. Director, Div. of Taxation, 97 N.J. 313, 333 (1984); In re the Petition By Controlled Cable Corp., 95 N.J. 473, 485 (1984); In re Kallen, 92 N.J. 14, 24–25 (1983); Texter v. Dep't of Human Serv., 88 N.J. 376, 385 (1982); Bd. of Educ. of City of Plainfield v. Cooperman, 209 N.J. Super. 174, 207 (App. Div. 1986) (modified, 105 N.J. 587, 523 (1987)). Administrative agencies effectuate out their regulatory responsibilities through rulemaking, adjudication of contested cases, and informal administrative action. Allstars Auto Grp., Inc. v. N.J. Motor Vehicle Comm'n, 234 N.J. 150, 161 (2018); In re Carberry, 114 N.J. 574, 584-85, (1989); In re Unif. Admin. Procedural Rules, 90 N.J. at 93-94 (1982).

GRC regulations promulgated under the APA and OPRA provide "procedures for the consideration of complaints filed pursuant to [OPRA]." N.J.A.C. 5:105-1.1. This includes a process for challenging a complainant's or custodian's legal representative. N.J.A.C. 5:105-2.3(i)-(j), N.J.A.C. 2.4(j)-(k). Specifically:

> Objections to a party's representative by another party, and a party's response thereto, to the complaint must be in writing, presented to the Council, served on all parties, and include:
>
> 1. The Council's case reference name and number;
> 2. Clear identification of the representative in question; and
> 3. A detailed explanation of the reasons for the objections, or conversely the response to such objections.
>
> [N.J.A.C. 5:105-2.3(i).]
>
> A party may respond to any challenge to its representative within five business days of receipt of the challenge.
>
> [N.J.A.C. 5:105-2.3(j).]

Notwithstanding the process set forth above, the remainder of the regulations are silent on the mechanism by which the Council has the authority to render a decision on disqualification of a party's representative: the Uniform Administrative Procedure Rules address such an issue.

> In any case where the issue of an attorney's ethical or professional conduct is raised, the judge before whom the issue has been presented shall consider the merits of the issue raised and make a ruling as to whether the attorney may appear or continue

> representation in the matter. The judge may disqualify an attorney from participating in a particular case when disqualification is required by the Rules of Professional Conduct or the New Jersey Conflict of Interest Law. If disciplinary action against the attorney is indicated, the matter shall be referred to the appropriate disciplinary body.
>
> [N.J.A.C. 1:1-5.3.]

Here, the Complainant has objected to Custodian Counsel's representation, asserting that he is a "necessary witness" in this complaint as a de facto custodian. Custodian's Counsel, after obtaining an extension, responded that the objections should not be accepted on two (2) bases. First, Counsel argued that the Complainant submitted an insufficient objection. Second, Counsel contended that there was no evidence in the record warranting disqualification on the basis that he (or any member of the Firm) was a "necessary witness."

As a threshold determination, the GRC disagrees that the Complainant's objection submission was insufficient. The Complainant identified the appropriate complaint and clearly identified the Firm as the "representative in question." Also, the Complainant provided a detailed explanation as to why she believed the Firm (inclusive of Custodian's Counsel) should be removed from representation.

To settle this issue, adjudicative facts are needed and are best determined in the context of an administrative hearing. There, an administrative law judge will hear testimony of the parties' witnesses and make credibility determinations based on the respective testimonies. Referral of the matter to the Office of Administrative Law ("OAL") therefore ensures that due process principles will be effectuated.

Accordingly, this complaint should thus be referred to the OAL for a determination on the Complainant's objection to representation and appropriate action as applicable. N.J.A.C. 5:105-1, *et seq.*; N.J.A.C. 1:1-5.3.

**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.

Here, the Complainant argued that the Custodian unlawfully denied her access to the responsive report under the personnel and attorney-client privilege/attorney work product exemptions. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-10. In the SOI, the Custodian contended that he lawfully denied access to the responsive report based on the relevant statutes and case law provided for in his initial and supplement responses. However, and for purposes of efficacy, the OAL should address this issue once it has determined the objection to representation issue.

Therefore, and for the purpose of efficacy, this complaint should be referred to the OAL for a determination as to whether the Custodian unlawfully denied access to the responsive report. N.J.S.A. 47:1A-6. Should the OAL find that an unlawful denial of access occurred, it shall order disclosure and determine whether the Custodian knowing and willfully denied access to same.

## Conclusions and Recommendations

The Council Staff respectfully recommends the Council find that:

1. This complaint should thus be referred to the Office of Administrative Law for a determination on the Complainant's objection to representation and appropriate action as applicable. N.J.A.C. 5:105-1, *et seq.*; N.J.A.C. 1:1-5.3.

2. For the purpose of efficacy, this complaint should be referred to the Office of Administrative Law for a determination as to whether the Custodian unlawfully denied access to the responsive report. N.J.S.A. 47:1A-6. Should the OAL find that an unlawful denial of access occurred, it shall order disclosure and determine whether the Custodian knowing and willfully denied access to same.

Prepared By: Frank F. Caruso
Acting Executive Director

April 23, 2019