



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

June 29, 2021 Government Records Council Meeting

Eric Jones
Complainant

Complaint No. 2019-45

v.

Plainfield Public School District (Union)
Custodian of Record

At the June 29, 2021 public meeting, the Government Records Council (“Council”) considered the June 22, 2021 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian failed to comply with the Council’s August 25, 2020 Interim Order because he did not respond in the prescribed time frame providing records for *in camera* review. Additionally, the Custodian failed to provide a certified confirmation of compliance to the Executive Director.
2. **The *In Camera* Examination set forth above reveals the Custodian has lawfully denied access to the withheld tenure charge documents under the exemption for records constituting inter-agency or intra-agency advisory, consultative, or deliberative material pursuant to N.J.S.A. 47:1A-6.**
3. The Custodian failed to comply with the Council’s August 25, 2020 Interim Order by failing to provide the responsive records for *in camera* review or a certified confirmation of compliance to the Executive Director. However, the evidence of record demonstrates that the Custodian lawfully denied access to the requested records. N.J.S.A. 47:1A-6. Additionally, the evidence of record does not indicate that the Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.
4. The Complainant has not achieved the desired result because the complaint did not bring about a change (voluntary or otherwise) in the custodian’s conduct. Teeters v. DYFS, 387 N.J. Super. 423, 432 (App. Div. 2006). Additionally, no 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, 71 (2008). Specifically, the *in camera* review confirmed that the requested records constitute “inter-agency or intra-agency advisory, consultative,

or deliberative material,” and therefore were lawfully withheld from access at the time of the request. Therefore, the Complainant is not 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. at 432, and Mason, 196 N.J. at 71.

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

Final Decision Rendered by the
Government Records Council
On The 29th Day of June 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: July 1, 2021

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

***In Camera* Findings and Recommendations of the Executive Director
June 29, 2021 Council Meeting**

**Eric Jones¹
Complainant**

GRC Complaint No. 2019-45

v.

**Plainfield Public School District (Union)²
Custodial Agency**

Records Relevant to Complaint: Copies of:

January 24, 2019 OPRA Request³

Tenure Charge document distributed to the Plainfield Board of Education (“Board”) Members on Tuesday, January 15, 2019.

January 29, 2019 OPRA Request⁴

Evaluative materials used in drafting the Tenure Charge document.

Custodian of Record: Gary L. Ottmann

Request Received by Custodian: January 24, 2019; January 29, 2019

Response Made by Custodian: January 28, 2019; February 14, 2019

GRC Complaint Received: February 28, 2019

Records Submitted for *In Camera* Examination: Tenure charge documents distributed to the Board Members on Tuesday, January 15, 2019.

Background

August 25, 2020 Council Meeting:

At its August 25, 2020 public meeting, the Council considered the August 18, 2020 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. The Complainant’s January 29, 2019 OPRA request seeking “evaluative materials”

¹ Represented by Jesse Humphries, Esq., of Oxfield Cohen, P.C. (Newark, N.J.).

² No representation listed on record. Previously represented by Amy A. Pujara, Esq., of DiFrancesco, Bateman, Kunzman, Davis, Lehrer & Flaum, P.C. (Warren, N.J.).

³ The Complainant requested additional records that are not at issue in this complaint.

⁴ The Complainant requested additional records that are not at issue in this complaint.

- used to draft the Tenure Charge document is invalid as it failed to identify specific government records. See MAG Entm't, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005); Bent v. Stafford Police Dep't, 381 N.J. Super. 30, 37 (App. Div. 2005), N.J. Builders Ass'n v. N.J. Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009); and Feiler-Jampel v. Somerset Cnty. Prosecutor's Office, GRC Complaint No. 2007-190 (Interim Order dated March 26, 2008). Thus, the Custodian lawfully denied access to the request. N.J.S.A. 47:1A-6. Furthermore, because the request was invalid, the Council need not address the Custodian's remaining defenses.
2. The GRC must conduct an *in camera* review of the Tenure Charge document to determine the validity of the Custodian's assertion that same was lawfully withheld under OPRA's exemptions for advisory, consultative, or deliberative material and/or attorney-client privileged material. N.J.S.A. 47:1A-1.1. See Paff v. N.J. Dep't of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005).
 3. **The Custodian shall deliver⁵ to the Council in a sealed envelope nine (9) copies of the requested unredacted record (see conclusion No. 2 above), a document or redaction index⁶, as well as a legal certification from the Custodian, in accordance with N.J. Court Rules, R. 1:4-4,⁷ that the record provided is the record 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.**
 4. 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.
 5. 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 August 26, 2020, the Council distributed its Interim Order to all parties. On October 14, 2020, the GRC e-mailed the Custodian, requesting an update on compliance with the Interim Order. On October 23, 2020, Ms. Pujara e-mailed the GRC stating that her firm no longer represented the Custodian. Ms. Pujara added that while her office prepared the record in question, they no longer possessed the computer in which the record was stored. Ms. Pujara stated that while her office possessed an earlier draft of the document, it did not contain a watermark or the exhibits accompanying the document. Ms. Pujara asked if providing the draft copy was acceptable.

⁵ The *in camera* records may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives them by the deadline.

⁶ The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

⁷ "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."

On November 2, 2020, the GRC responded to Ms. Pujara, requesting nine (9) copies of the available version of the record. The GRC also requested the contact information of the Custodian's current representative, if available.

On November 11, 2020, the GRC received a letter from the Custodian dated October 30, 2020. The Custodian stated that he was unable to deliver any copies of the requested record, as it was not located within the Board's files.

On December 1, 2020, the GRC e-mailed Ms. Pujara stating that as of that date no copies of the draft have been received. The GRC requested nine (9) copies of the draft version of the document to be received by no later than December 4, 2020. Later that same day, Ms. Pujara responded stating that copies of the record at issue were sent to the GRC on November 4, 2020 but she could resubmit them.

On December 2, 2020, the GRC received a copy of the draft version of the requested record for *in camera* review from Ms. Pujara. On December 10, 2020, the GRC received the remaining eight (8) copies of the requested record for *in camera* review from Ms. Pujara. In the cover letter, Ms. Pujara maintained that the computer used to draft the record was no longer accessible, and that the version provided was an earlier draft of same. Ms. Pujara also stated that the record circulated at the Board meeting contained several exhibits that were not included here.

Analysis

Compliance

At its August 25, 2020 meeting, the Council ordered the Custodian to submit nine (9) unredacted copies of the requested e-mails within five (5) business days from receipt of the Council's Interim Order, and simultaneously provide certified confirmation of compliance to the Executive Director." On August 26, 2020, 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 September 2, 2020.

On October 13, 2020, the thirty-third (33rd) business day after submitting the Council's Order to the Custodian, the GRC requested an update on the Custodian's compliance with same. On October 23, 2020, Ms. Pujara responded to the GRC stating that the requested copy of the record was no longer available but could provide an earlier draft. On November 11, 2020, the fifty-second (52nd) business day after receipt of the Council's Order, the Custodian responded to the GRC stating that the Board did not possess any copies of the requested record.

On December 2 and 10, 2020, Ms. Pujara provided the GRC nine (9) copies of the available draft of the requested record. Ms. Pujara stated that the provided version lacked the referenced exhibits that were provided to the Board during the January 15, 2019 meeting. Additionally, as of June 15, 2021, the Custodian has not provided a certified confirmation of compliance to the Executive Director.

Therefore, the Custodian failed to comply with the Council's August 25, 2020 Interim Order because he did not respond in the prescribed time frame providing records for *in camera* review. Additionally, the Custodian failed to provide a 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.

Advisory, Consultative, or Deliberative ("ACD") Material

OPRA provides that the definition of a government record "shall not include [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 Center, 198 N.J. at 294.

In Libertarians for Transparent Gov't v. Gov't Records Council, 453 N.J. Super. 83, 89-90 (App. Div.) (certif. denied, 233 N.J. 484 (2018)), the Appellate Division discussed the deliberative process privilege at length regarding a request for draft meeting minutes, stating:

The applicability of the deliberative process privilege is government by a two-prong test. The judge must determine both that a document is (1) "pre-decisional," meaning it was "generated before the adoption of an agency's police or decision;" and (2) deliberative, in that it "contain[s] opinions, recommendations, or advice about agency policies." Educ. Law Ctr. v. Dep't of Educ., 198 N.J. 274, 286 (2009) (quoting Integrity, 165 N.J. at 84-85)). If a document stratifies both prongs, it is exempt from disclosure under OPRA pursuant to the deliberative process privilege.

Regarding the first prong, the court stated that "a draft is not a final document. It has been prepared for another person or persons' editing and eventual approval." Id. at 90. Therefore, the court held that draft meeting minutes are pre-decisional since they are subject to revision and not yet approved for public release. Id. at 90-91.

Regarding the second prong, the court held that "the document must be shown to be closely related to the formulation or exercise of . . . policy-oriented judgment or [to] the process by which policy is formulated." Id. at 91 (quoting Ciesla v. N.J. Dep't of Health & Sr. Servs., 429 N.J. Super. 127, 138 (App. Div. 2012) (internal quotations omitted)). The court found that the requested draft

minutes, as compiled by the writer in attendance at the meeting, were subject to additions, suggestions, and other edits from the members of the public body. Id. Thus, the draft minutes satisfied the second prong of the test. Id. at 92.

Finally, in Eastwood v. Borough of Englewood Cliffs (Bergen), GRC Complaint No. 2012-121 (June 2013), the mayor, during a special meeting, showed members of the public the conceptual drawings of a redevelopment plan on a tablet device. Despite a public airing of the document, the custodian later denied a copy of the drawings, arguing that they constituted ACD material and were therefore exempt from disclosure under OPRA. N.J.S.A. 47:1A-1.1. The Council held that:

[T]he ACD exemption is not akin to a privilege that can be waived through voluntary disclosure to the public similar to the attorney-client privilege exemption. ACD material is a description, not a privilege. Therefore, ACD material does not lose its character as ACD merely because it was shown in public. The ACD exemption is always held in light of the Integrity test.

[Id. at 4.]

Thus, despite the mayor's decision to show the ACD material at a public meeting, the Council held that OPRA intended that the ACD privilege be preserved in the public interest. That interest protects a privilege that "bars the 'disclosure of proposed policies before they have been fully vetted and adopted by a government agency,' thereby ensuring that an agency is not judged by a policy that was merely considered." Ibid. (citing Ciesla, 429 N.J. Super. at 127).

Additionally, in Williams v. Bd. of Educ. of Atlantic City Public Schs., 329 N.J. Super. 308, 311 (App. Div. 2000), an intervenor media outlet sought tenure charge documents against a superintendent under the Right-to-Know-Law ("RTKL"). The plaintiff opposed disclosure, stating that because the Atlantic City Board of Education could only act on the requested documents in closed session pursuant to N.J.S.A. 18A:6-11, it would undermine his privacy rights if the tenure charge documents were exposed to public view. Id. at 316. The court disagreed, holding that because the tenure charge documents were required to be "filed" with the board secretary under N.J.S.A. 18A:6-11, they fit the definition of "public records" under the RTKL. Id. at 314-15. The court found "no valid exception to the public record requirement. The documents were, therefore, accessible on filing." Id. at 318.

Additionally, N.J.A.C. 1:1-15.2(a) and (b) state that official notice may be taken of judicially noticeable facts (as explained in N.J.R.E. 201 of the New Jersey Rules of Evidence), as well as of generally recognized technical or scientific facts within the specialized knowledge of the agency or the judge.

In the instant matter, the GRC first notes that the provided records do not reflect those requested by the Complainant, as both Ms. Pujara and the Custodian stated that they did not possess copies of same. Instead, Ms. Pujara provided an earlier draft of the record for review. Thus, the GRC's review of the records is limited to the version provided and may not speculate as to the

potential distinctions between the record that was provided for *in camera* review and the record requested by the Complainant.

Nevertheless, the Custodian asserted that the requested records were a draft and not subject to disclosure at the time it was distributed to Board members. The Complainant argued that tenure charge documents were a matter of public record once provided to the Board members during a public meeting, relying on Williams, 329 N.J. Super. 308.

Regarding the public meeting, the GRC takes judicial notice of the Board's "January 15, 2019 Work & Study Meeting Minutes" ("Exhibit A"). Under section VII, "REMARKS FROM THE PUBLIC", the minutes indicate that the Board members received copies of the requested records at issue for deliberation and review, which were prepared by the Board's appointed counsel. The minutes also state that the documents were not intended to certify anything, and the Board "did not officially vote on anything that night." Exhibit A at *2. The Board was tasked that evening to review the documents and inform counsel whether to serve the Complainant with the documents. Id. Ultimately, the Board voted to drop the related documents. Id. at *3.

Upon *in camera* review of the records provided and the remarks contained in Exhibit A, the GRC is satisfied that the tenure charge documents were exempt from disclosure as comprising ACD material. Initially, the records satisfy the first prong of the analysis. Under N.J.S.A. 18A:6-11, once a charge is "filed", the Board is required to provide the employee with a copy of the charges along with the supporting evidence. However, unlike the tenure charge documents in Williams, there is no indication that the documents reviewed by the Board were filed with the Board's secretary. Additionally, the fact that the Board had yet to decide whether to serve the Complainant with the documents further demonstrates that the tenure charges had not been filed. Therefore, the documents provided to the Board during the public meeting were draft documents and pre-decisional. See Ciesla, 429 N.J. Super. at 140-41.

As to the second prong, the documents provided to the GRC contain the opinions and recommendations of the Board's President regarding the Complainant's conduct. The documents were then provided to the Board for the express purpose of deliberation leading to the agency's decision whether to serve charges against the Complainant. See Exhibit A. Therefore, the documents satisfy the second prong. See Ciesla, 429 N.J. Super. at 140-41.

Thus, the Custodian lawfully denied access to the withheld records because they fell within the ACD exemption. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-6. For this reason, no disclosure is warranted. Additionally, the GRC declines to address the Custodian's additional defenses to disclosure.

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)).

The Custodian failed to comply with the Council’s August 25, 2020 Interim Order by failing to provide the responsive records for *in camera* review or a certified confirmation of compliance to the Executive Director. However, the evidence of record demonstrates that the Custodian lawfully denied access to the requested records. N.J.S.A. 47:1A-6. Additionally, the evidence of record does not indicate that the Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

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, 432 (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. 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 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 also 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, [certif. denied] (1984).

[Id. at 76.]

Here, the Complainant sought access to the tenure charge documents distributed to the Board during a public meeting held on January 15, 2019. The Custodian denied access to the request, asserting that requested documents constituted ACD material.

In determining whether the Complainant is a prevailing party, the evidence of record must establish that a casual nexus exists between the filing of this complaint and disclosure of records. Having reviewed the evidence, the GRC does not find that such a casual nexus exists. Based upon the findings of the *in camera* review, the requested records constituted ACD material. Thus, at the time of the subject OPRA request, no unlawful denial of access occurred, and the Custodian was under no obligation to provide the records to the Complainant.

Therefore, the Complainant has not achieved the desired result because the complaint did not bring about a change (voluntary or otherwise) in the custodian's conduct. Teeters, 387 N.J. Super. at 432. Additionally, no factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Mason, 196 N.J. at 71. Specifically, the *in camera* review confirmed that the requested records constitute ACD material, and therefore were lawfully withheld from access at the time of the request. Therefore, the Complainant is not 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. at 432, and Mason, 196 N.J. at 71.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian failed to comply with the Council's August 25, 2020 Interim Order because he did not respond in the prescribed time frame providing records for *in camera* review. Additionally, the Custodian failed to provide a certified confirmation of compliance to the Executive Director.
2. **The *In Camera* Examination set forth above reveals the Custodian has lawfully denied access to the withheld tenure charge documents under the exemption for records constituting inter-agency or intra-agency advisory, consultative, or deliberative material pursuant to N.J.S.A. 47:1A-6.**
3. The Custodian failed to comply with the Council's August 25, 2020 Interim Order by failing to provide the responsive records for *in camera* review or a certified confirmation of compliance to the Executive Director. However, the evidence of record demonstrates that the Custodian lawfully denied access to the requested records. N.J.S.A. 47:1A-6. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.
4. The Complainant has not achieved the desired result because the complaint did not bring about a change (voluntary or otherwise) in the custodian's conduct. Teeters v.

DYFS, 387 N.J. Super. 423, 432 (App. Div. 2006). Additionally, no 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, 71 (2008). Specifically, the *in camera* review confirmed that the requested records constitute “inter-agency or intra-agency advisory, consultative, or deliberative material,” and therefore were lawfully withheld from access at the time of the request. Therefore, the Complainant is not 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. at 432, and Mason, 196 N.J. at 71.

Prepared By: Samuel A. Rosado
Staff Attorney

June 22, 2021

BOARD OF EDUCATION OF THE CITY OF PLAINFIELD
IN UNION COUNTY, NEW JERSEY

MINUTES of a **WORK & STUDY** Meeting of the Board of
Education Held on Tuesday, January 15, 2019

A **WORK & STUDY MEETING** of the Plainfield Board of Education of the City of Plainfield was held this day in the Plainfield High School conference room. Notice had been provided to Board members and to the Courier News, Star Ledger, Public Library, City Clerk, Plainfield Police Department, and posted in all Plainfield Public Schools and on the Plainfield Public Schools' website. Mrs. Yolanda Koon, Acting Board Secretary called the meeting to order at 6:35 p.m. and the following action took place:

I. PLEDGE OF ALLEGIANCE

II. WELCOME

WELCOME to a Work & Study Meeting of the Plainfield Board of Education. Members hope you will find the meeting interesting and informative. We thank you for taking the time to attend. Please be advised that this and all meetings of the Board are open to the media and public, consistent with the Open Public Meetings Act (Ch. 231, Laws of 1975), and that the advance notice required therein has been provided to the Courier News and the Star Ledger on Wednesday, December 19, 2018 to be advertised on Saturday, December 29, 2018.

III. ROLL CALL

PRESENT

Mr. Richard Wyatt, President
Mr. Cameron E. Cox, Vice President
Ms. Lynn B. Anderson
Mr. Eric Andrews
Mr. John C. Campbell
Mr. Terence J. Johnson
Ms. Carmencita T. Pile
Mrs. Emily E. Morgan

ALSO PRESENT

Dr. Ronald E. Bolandi, Interim Superintendent
Mr. Philip Stern, Esq.
Mrs. Yolanda Koon

Dr. Avania A. Richardson-Miller, absent

The Plainfield Board of Education began the public session of the Work & Study meeting at 6:35 p.m.

IV. REMARKS FROM THE BOARD PRESIDENT

Mr. Wyatt thanked all for attending. He also mentioned the format change of the Work & Study meeting to increase parent and community involvement.

V. REMARKS FROM THE INTERIM SUPERINTENDENT

Dr. Bolandi announced the Apple presentation to expand the one-on-one for K-5; 6-12th grade has been completed.

VI. REPORTS FROM COMMITTEE CHAIRPERSONS

Mr. Cox made a motion to move the organization agenda to the next meeting. Mr. Wyatt seconded and unanimously approved by the Board to move the organization agenda to the next meeting.

Curriculum & Instruction was moved to the business agenda.

Finance agenda was moved to the business agenda, Items E & F were pulled.

Policies were moved to business agenda.

Human Resources was moved to the business agenda.

Mr. Ottmann announced the District has another opportunity to re-finance the bonds, which would save approximately save the District \$700,000.00 and additional information would be forthcoming.

Dr. Bolandi stated that the 2019 – 2020 budget will be sent home next Friday.

VII. REMARKS FROM THE PUBLIC

Mr. Stern stated the Board will be addressing the Rice notice and employees have the option to have the discussion in public or private. Eric Jones opted to have the discussion in public. The Board had some concerns regarding Mr. Jones's which resulted in a the RICE notice, and wanted to discuss the matter. The Board requested Mr. Stern to draft documents, which he distributed for the Board only.

The Board would instruct Mr. Stern, after reading the documents, whether to serve the documents to Mr. Jones. These documents were not to certify anything, and the Board did not officially vote on anything that night. The Board will deliberate over the documents, by law. The discussion is not permitted in public. This is no vote, a process where the Board will review the documents and will inform Mr. Stern whether or not to serve Mr. Jones with the documents.

Tenure charges can be filed by anyone and typically, it is the Superintendent and administration. In this case, the Board is part of the process and need to see the documents. If the Board wishes are to serve the charges to the employee, then the employee will have 15 days to respond to the charges.

Tonight, the Board will instruct Mr. Stern regarding the documents.

Mr. Stern stated by law, the tenure charges are not public documents.

Ms. Pile inquired if the Board is able to discuss the documents in public. Mr. Stern responded, yes.

The meeting was overwhelmed with over 20-30 other districts and other organization representatives from across the entire State of NJ. There were busloads all in support of Eric Jones. The PEA has issued red shirts that read ...I AM ERIC JONES. The auditorium was full with several hundred in attendance. City officials, counsel persons, former board members all present. During the remarks of public, the audience would chant ...I AM ERIC JONES...I AM ERIC JONES. The comments and speeches were heard. The Board out of courtesy extended the public remarks.

Mr. Stern distributed documents only to the Board for review. It took over several minutes. The public waited. Board member Ms. Pile had a question for Mr. Stern for clarity. Clarity was established and then she proceeded to say that Plainfield BOE not Eric Jones, had created the circus. I ran for office for the kids (children 1st). I know I am the lone wolf on this board as she howled. I hope I get the same support that Mr. Jones has received if I need it.

Ms. Pile moved and seconded by Mr. Johnson to drop the documents (Tenure charges) against Eric Jones. The motion carried on a roll-call vote with five members in favor. Mr. Cox abstained. Mr. Campbell and Mrs. Morgan opposed.

Mr. Cox moved and seconded by Mr. Wyatt and unanimously approved by the Board to adjourn the public session at 9:30 p.m.

VIII. ADJOURNMENT – PUBLIC SESSION

The following resolution was moved by Mr. Wyatt, and seconded by Mr. Cox and unanimously approved by the Board:

RESOLUTION

WHEREAS, the Open Public Meetings Act, N.J.S.A. 10:4-11, permits the Board of Education to meeting in closed session to discuss certain matters, now therefore be it,

RESOLVED, the Board of Education adjourns to closed session to discuss:

- Personnel
- Legal and be it

FURTHER RESOLVED, the minutes of this closed session be made public when the need for confidentiality no longer exists.

The Board of Education adjourned into its Executive Session at 9:38 p.m.

Mr. Wyatt moved and seconded by Mr. Cox and unanimously approved by the Board to adjourn the meeting at 10:50 p.m.

Reported by,

Yolanda Koon, Acting Board Secretary
YK/bsc



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

August 25, 2020 Government Records Council Meeting

Eric Jones
Complainant

Complaint No. 2019-45

v.

Plainfield Public School District (Union)
Custodian of Record

At the August 25, 2020 public meeting, the Government Records Council (“Council”) considered the August 18, 2020 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Complainant’s January 29, 2019 OPRA request seeking “evaluative materials” used to draft the Tenure Charge document is invalid as it failed to identify specific government records. See MAG Entm’t, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005); Bent v. Stafford Police Dep’t, 381 N.J. Super. 30, 37 (App. Div. 2005), N.J. Builders Ass’n v. N.J. Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009); and Feiler-Jampel v. Somerset Cnty. Prosecutor’s Office, GRC Complaint No. 2007-190 (Interim Order dated March 26, 2008). Thus, the Custodian lawfully denied access to the request. N.J.S.A. 47:1A-6. Furthermore, because the request was invalid, the Council need not address the Custodian’s remaining defenses.
2. The GRC must conduct an *in camera* review of the Tenure Charge document to determine the validity of the Custodian’s assertion that same was lawfully withheld under OPRA’s exemptions for advisory, consultative, or deliberative material and/or attorney-client privileged material. N.J.S.A. 47:1A-1.1. See Paff v. N.J. Dep’t of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005).
3. **The Custodian shall deliver¹ to the Council in a sealed envelope nine (9) copies of the requested unredacted record (see conclusion No. 2 above), a document or redaction index², as well as a legal certification from the Custodian, in accordance with N.J. Court Rules, R. 1:4-4,³ that the record provided is the record requested**

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 the GRC physically receives them 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."

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.

4. 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.
5. 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 25th Day of August 2020

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 26, 2020

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
August 25, 2020 Council Meeting**

**Eric Jones¹
Complainant**

GRC Complaint No. 2019-45

v.

**Plainfield Public School District (Union)²
Custodial Agency**

Records Relevant to Complaint: Copies of:

January 24, 2019 OPRA Request³

Tenure Charge document distributed to the Plainfield Board of Education (“Board”) Members on Tuesday, January 15, 2019.

January 29, 2019 OPRA Request⁴

Evaluative materials used in drafting the Tenure Charge document.

Custodian of Record: Gary L. Ottmann

Request Received by Custodian: January 24, 2019; January 29, 2019

Response Made by Custodian: January 28, 2019; February 14, 2019

GRC Complaint Received: February 28, 2019

Background⁵

Request and Response:

January 24, 2019 OPRA request:

On January 24, 2019, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On January 28, 2019, the Custodian responded in writing stating that the requested record was exempt from disclosure under the attorney-client privilege, since the Board’s attorney prepared it after the Board sought advice and interpretation related to a potential disciplinary action. N.J.S.A. 47:1A-1.1. The Custodian also

¹ Represented by Jesse Humphries, Esq., of Oxfeld Cohen, P.C. (Newark, N.J.).

² Represented by Amy A. Pujara, Esq., of DiFrancesco, Bateman, Kunzman, Davis, Lehrer & Flaum, P.C. (Warren, N.J.).

³ The Complainant requested additional records that are not at issue in this complaint.

⁴ The Complainant requested additional records that are not at issue in this complaint.

⁵ 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.

stated that the record was exempt under OPRA's exemption for inter-agency or intra-agency advisory, consultative, or deliberative ("ACD") material because it contained "factual and evaluative information" the Board used to determine whether or not to pursue tenure charges against an employee. N.J.S.A. 47:1A-1.1; Educ. Law Ctr. v. N.J. Dep't of Educ., 198 N.J. 274 (2009); and Paff v. Highpoint Reg'l Sch. Bd. of Educ., Dkt. No. SSX-L-594-12 (December 12, 2012). The Custodian stated that since the tenure charge document was a draft prepared by the Board attorney prior to any decision, it was exempt from disclosure under OPRA. See also Army Times Publishing Co. v. Dep't of the Air Force, 998 F.2d 1069 (D.C. Cir. 1993).

January 29, 2019 OPRA request:

On January 29, 2019, the Complainant submitted an OPRA request to the Custodian seeking the above-mentioned records. On February 14, 2019, the Custodian's Counsel responded in writing, stating that the request did not specifically identify the request records, but to the extent the Complainant sought records relied upon in drafting the tenure charges, Counsel stated that the request sought ACD material exempt from disclosure. See N.J.S.A. 47:1A-1.1; Educ. Law Ctr., 198 N.J. 274; and Army Times, 998 F.2d 1069. Counsel also stated that the Complainant's request sought personnel records exempt from disclosure via N.J.S.A. 47:1A-10. Counsel recommended the Complainant resubmit his OPRA request with greater specificity.

Denial of Access Complaint:

On February 28, 2019, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant, through Counsel, asserted that the Appellate Division held that "tenure charge documents . . . are 'public records' within the meaning of the Right-to-Know Law." Williams v. Bd. of Educ. of Atlantic City, 329 N.J. Super. 308, 318 (App. Div. 2000). The Complainant asserted that the court found no lawful basis to withhold the record and was "accessible on filing." Id. The Complainant asserted that since OPRA's enactment, the Office of Administrative Law has referenced Williams when ordering disclosure of tenure charge documents. See In the Matter of the Tenure Hearing of Andrew J. Jackson, OAL Dkt. No. EDU 1007-10 (Apr. 23, 2010); In the Matter of the Tenure Hearing of Lourdes Leon, OAL Dkt. Nos. EDU 5073-7 and EDU 12540-7 (Consolidated) (May 7, 2009); In the Matter of the Tenure Hearing of George C. Langley, OAL Dkt. No. EDU 2212-7 (Feb. 19, 2008); and In the Matter of the Tenure Hearing of Gary Willis, OAL Dkt. No. EDU 91-05 (July 8, 2005).

The Complainant asserted that based upon the foregoing, the tenure charge documents and records related to the tenure charge documents were public records subject to access under OPRA. The Complainant argued that although decided prior to OPRA, subsequent cases have relied upon Williams to find that records the tenure charge document drafted against him and any related records were public records subject to access.

Statement of Information:⁶

On July 31, 2019, the Custodian filed a Statement of Information ("SOI"). The Custodian

⁶ The Complaint was referred to mediation on April 3, 2019. The Complaint was referred back from mediation on July 17, 2019.

certified that he received the Complainant's OPRA requests on January 24 and January 29, 2019. The Custodian did not mention receiving the second January 29, 2019 request. The Custodian certified that he responded in writing on January 28, and February 14, 2019.

The Custodian maintained the same arguments asserted in his responses dated January 28 and February 14, 2019. The Custodian asserted that the draft of the tenure charge document was exempt from disclosure under the attorney-client privilege and/or the ACD exemption. N.J.S.A. 47:1A-1.1.

The Custodian also asserted that the "evaluative material" requested by the Complainant was not clearly identified, and the Complainant did not resubmit his request with greater specificity as requested. Notwithstanding, the Custodian asserted that to the extent the request sought records relied upon when drafting the tenure charge document, such records were not subject to access under OPRA's ACD exemption. N.J.S.A. 47:1A-1.1.

Analysis

Validity of Request

January 29, 2019 OPRA request

The New Jersey Appellate Division has held that:

While OPRA provides an alternative means of access to government documents not otherwise exempted from its reach, *it is not intended as a research tool litigants may use to force government officials to identify and siphon useful information. Rather, OPRA simply operates to make identifiable government records "readily accessible for inspection, copying, or examination."* N.J.S.A. 47:1A-1.

[MAG Entm't, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005) (emphasis added).]

The Court reasoned that:

Most significantly, the request failed to identify with any specificity or particularity the governmental records sought. *MAG provided neither names nor any identifiers other than a broad generic description of a brand or type of case prosecuted by the agency in the past.* Such an open-ended demand required the Division's records custodian to manually search through all of the agency's files, analyze, compile and collate the information contained therein, and identify for MAG the cases relative to its selective enforcement defense in the OAL litigation. Further, once the cases were identified, the records custodian would then be required to evaluate, sort out, and determine the documents to be produced and those otherwise exempted.

[Id. at 549 (emphasis added).]

The Court further held that “[u]nder OPRA, agencies are required to disclose only ‘identifiable’ government records not otherwise exempt . . . In short, OPRA does not countenance open-ended searches of an agency's files.” Id. (emphasis added). Bent v. Stafford Police Dep’t, 381 N.J. Super. 30, 37 (App. Div. 2005),⁷ N.J. Builders Ass’n v. N.J. Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).

The validity of an OPRA request typically falls into three (3) categories. The first is a request that is overly broad (“any and all” requests seeking “records” generically, etc.) and requires a custodian to conduct research. MAG, 375 N.J. Super. at 534; Donato v. Twp. of Union, GRC Complaint No. 2005-182 (January 2007). The second is those requests seeking information or asking questions. See e.g. Rummel v. Cumberland Cnty. Bd. of Chosen Freeholders, GRC Complaint No. 2011-168 (December 2012). The final category is a request that is either not on an official OPRA request form or does not invoke OPRA. See e.g. Naples v. N.J. Motor Vehicle Comm’n, GRC Complaint No. 2008-97 (December 2008).

Regarding generic requests for “records,” the request at issue in MAG sought “all documents or records evidencing that the ABC sought, obtained or ordered revocation of a liquor license for the charge of selling alcoholic beverages to an intoxicated person in which such person, after leaving the licensed premises, was involved in a fatal auto accident” and “all documents or records evidencing that the ABC sought, obtained or ordered suspension of a liquor license exceeding 45 days for charges of lewd or immoral activity.” Id. at 539-540. The court noted that plaintiffs failed to include additional identifiers such as a case name or docket number. See also Steinhauer-Kula v. Twp. of Downe (Cumberland), GRC Complaint No. 2010-198 (March 2012) (holding that the complainant’s request item No. 2 seeking “[p]roof of submission” was invalid); Edwards v. Hous. Auth. of Plainfield (Union), GRC Complaint No. 2008-183, *et seq.* (April 2012) (accepting the Administrative Law Judge’s finding that a newspaper article attached to a subject OPRA request that was related to the records sought did not cure the deficiencies present in the request) Id. at 12-13.

Moreover, in Feiler-Jampel v. Somerset Cnty. Prosecutor’s Office, GRC Complaint No. 2007-190 (Interim Order dated March 26, 2008), the Council similarly held that a request seeking “[a]ny and all documents and evidence” relating to an investigation being conducted by the Somerset County Prosecutor’s Office was invalid, reasoning that:

[B]ecause the records requested comprise an entire SCPO file, the request is overbroad and of the nature of a blanket request for a class of various documents rather than a request for specific government records. Because OPRA does not require custodians to research files to discern which records may be responsive to a request, the Custodian had no legal duty to research the SCPO files to locate records potentially responsive to the Complainant’s request pursuant to the Superior Court’s decisions in [MAG], [Bent] and the Council’s decisions in Asarnow v. Department of Labor and Workforce Development, GRC Complaint

⁷ Affirmed on appeal from Bent v. Stafford Police Dep’t, GRC Complaint No. 2004-78 (October 2004).

No. 2006-24 (May 2006) and Morgano v. Essex Cnty. Prosecutor's Office, GRC Complaint No. 2007-190 (February 2008).

[Id. See also Schulz v. N.J. State Police, GRC Complaint No. 2014-390 (Interim Order dated July 28, 2015) (holding that the portion of the request seeking "all documents" was overly broad and thus invalid).]

In the instant matter, the Complainant's January 29, 2019 OPRA request sought "evaluative materials" used in drafting the Tenure Charge document sought in the Complainant's other OPRA request. The Custodian asserted that the request did not identify specific records or documents and asked the Complainant to resubmit the request with greater specificity. The Complainant did not acquiesce and filed the instant complaint. In accordance with MAG and its progeny, the request seeking "evaluative materials" is invalid, as it could encompass several categories of records used to create the Tenure Charge document.

Accordingly, the Complainant's January 29, 2019 OPRA request seeking "evaluative materials" used to draft the Tenure Charge document is invalid as it failed to identify specific government records. See MAG, 375 N.J. Super. at 546; Bent, 381 N.J. Super. at 37; N.J. Builders, 390 N.J. Super. at 180; Schuler, GRC 2007-151; and Feiler-Jampel, GRC 2007-190. Thus, the Custodian lawfully denied access to the request. N.J.S.A. 47:1A-6. Furthermore, because the request was invalid, the Council need not address the Custodian's remaining defenses.

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.

January 24, 2019 OPRA request

In Paff v. N.J. Dep't of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005), the complainant appealed a final decision of the Council⁸ 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

⁸ Paff v. N.J. Dep't of Labor, Bd. of Review, GRC Complaint No. 2003-128 (October 2005).

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.]

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.]

In the instant matter, the Custodian asserted that the Tenure Charge document sought in the Complainant’s January 24, 2019 OPRA request was a draft prepared by Counsel prior to a decision by the Board. The Custodian therefore argued that the record contained ACD and/or attorney-client privileged material and was not subject to access under OPRA. N.J.S.A. 47:1A-1.1. The Complainant asserted that the document was part of the public record under Williams, 329 N.J. Super. at 318, and the Custodian was therefore required to produce the record.

Nevertheless, a “meaningful review” is necessary to determine whether the Tenure Charge document reasonably fell within the ACD and/or attorney-client exemption. The GRC must thus review same to determine the full applicability of exemptions.

Therefore, the GRC must conduct an *in camera* review of the Tenure Charge document to determine the validity of the Custodian’s assertion that same was lawfully withheld under OPRA’s exemptions for ACD and/or attorney-client privileged material. N.J.S.A. 47:1A-1.1. 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 Complainant's January 29, 2019 OPRA request seeking "evaluative materials" used to draft the Tenure Charge document is invalid as it failed to identify specific government records. See MAG Entm't, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005); Bent v. Stafford Police Dep't, 381 N.J. Super. 30, 37 (App. Div. 2005), N.J. Builders Ass'n v. N.J. Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009); and Feiler-Jampel v. Somerset Cnty. Prosecutor's Office, GRC Complaint No. 2007-190 (Interim Order dated March 26, 2008). Thus, the Custodian lawfully denied access to the request. N.J.S.A. 47:1A-6. Furthermore, because the request was invalid, the Council need not address the Custodian's remaining defenses.
2. The GRC must conduct an *in camera* review of the Tenure Charge document to determine the validity of the Custodian's assertion that same was lawfully withheld under OPRA's exemptions for advisory, consultative, or deliberative material and/or attorney-client privileged material. N.J.S.A. 47:1A-1.1. See Paff v. N.J. Dep't of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005).
3. **The Custodian shall deliver⁹ to the Council in a sealed envelope nine (9) copies of the requested unredacted record (see conclusion No. 2 above), a document or redaction index¹⁰, as well as a legal certification from the Custodian, in accordance with N.J. Court Rules, R. 1:4-4,¹¹ that the record provided is the record 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.**
4. 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.
5. 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: Samuel A. Rosado
Staff Attorney

August 18, 2020

⁹ The *in camera* records may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives them by the deadline.

¹⁰ The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

¹¹ "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."