



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

May 30, 2023 Government Records Council Meeting

Tom Maciejewski
Complainant

Complaint No. 2020-110

v.

Berkeley Heights Board of Education (Union)
Custodian of Record

At the May 30, 2023 public meeting, the Government Records Council (“Council”) considered the May 23, 2023 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 dismiss the complaint because the parties have agreed to a prevailing party fee amount, thereby negating the need for Complainant’s Counsel to submit a fee application in accordance with N.J.A.C. 5:105-2.13. Therefore, no further adjudication is required.

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

Final Decision Rendered by the
Government Records Council
On The 30th Day of May 2023

Robin Berg Tabakin, Esq., Chair
Government Records Council

I attest the foregoing is a true and accurate record of the Government Records Council.

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: June 6, 2023



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

Prevailing Party Attorney's Fees
**Supplemental Findings and Recommendations of the Executive Director
May 30, 2023 Council Meeting**

**Tom Maciejewski¹
Complainant**

GRC Complaint No. 2020-110

v.

**Berkeley Heights Board of Education (Union)²
Custodial Agency**

Records Relevant to Complaint:

November 16, 2019 OPRA Request: Copies of legal bills of the Berkeley Heights Board of Education (“Board”) for the last six (6) months.

March 4, 2020 OPRA Request: Copies of all legal bills from October 1, 2019 until the present.

Custodian of Record: Julie A. Kot³

Request Received by Custodian: November 16, 2019; March 4, 2020

Response Made by Custodian: November 25, 2019; March 13, 2020

GRC Complaint Received: June 4, 2020

Background

March 28, 2023 Council Meeting:

At its March 28, 2023 public meeting, the Council considered the March 21, 2023 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, found that:

1. The current Custodian did not fully comply with the Council’s January 31, 2023 Interim Order. Specifically, although he provided the records and certified confirmation of compliance to the Executive Director, he failed to provide same within the extended time frame.

¹ Represented by Walter M. Luers, Esq. of Cohn Lifland, Pearlman, Herrmann & Knopf, LLP (Saddle Brook, NJ).

² Represented by David L. Disler, Esq. of Porzio, Bromberg & Newman, P.C. (Morristown, NJ).

³ The Custodian of Record at the time of the request was Donna Felezzola, who retired as of July 1, 2021. The current Custodian of Record is Stephen Hopkins.

2. The original Custodian violated OPRA by withholding from access portions of the responsive records. N.J.S.A. 47:1A-6. Further, the current Custodian failed to comply with the Council's January 31, 2023 Interim Order based on timeliness issues. However, the current Custodian ultimately provided responsive records, and lawfully withheld a portion of same. 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 original Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

3. Pursuant to the Council's January 31, 2023 Interim Order, the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." Teeters v. DYFS, 387 N.J. Super. 423, 432 (App. Div. 2006). Additionally, a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51, 76 (2008). Specifically, the Custodian provided the Complainant with records withheld in their entirety. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. at 432, and Mason, 196 N.J. at 76. **Based on this determination, the parties shall confer in an effort to decide the amount of reasonable attorney's fees to be paid to Complainant within twenty (20) business days. The parties shall promptly notify the GRC in writing if a fee agreement is reached. If the parties cannot agree on the amount of attorney's fees, Complainant's Counsel shall submit a fee application to the Council in accordance with N.J.A.C. 5:105-2.13.**

Procedural History:

On March 30, 2023, the Council distributed its Interim Order to all parties. On April 27, 2023, the Custodian's Counsel e-mailed the GRC requesting an extension of time until May 4, 2023 for the parties to reach an agreement on the issue of attorney's fees. That same day, the GRC responded to Custodian's Counsel, granting the request for an extension until May 4, 2023.

On April 28, 2023, the Complainant's Counsel confirmed via e-mail, which was copied to Custodian's Counsel, that the fee issue was amicably resolved.

Analysis

Prevailing Party Attorney's Fees

At its March 28, 2023 meeting, the Council determined that the Complainant was a prevailing party entitled to an award of reasonable attorney's fees. The Council thus ordered that the "parties shall confer in an effort to decide the amount of reasonable attorney's fees to be paid to Complainant within twenty (20) business days." The Council further ordered that the parties notify of any settlement prior to the expiration of the twenty (20) business day time frame. Finally,

the Council ordered that, should the parties not reach an agreement, the Complainant’s Counsel would be required to “submit a fee application to the Council in accordance with N.J.A.C. 5:105-2.13.”

On March 30, 2023, the Council distributed its Interim Order to all parties; thus, the Custodian’s response was due by close of business on April 28, 2023. On April 28, 2023, Complainant’s Counsel e-mailed the GRC and the Custodian that a settlement has been reached between the parties on the issue of counsel fees.

Accordingly, the Council should dismiss the complaint because the parties have agreed to a prevailing party fee amount, thereby negating the need for Complainant’s Counsel to submit a fee application in accordance with N.J.A.C. 5:105-2.13. Therefore, no further adjudication is required.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that the Council should dismiss the complaint because the parties have agreed to a prevailing party fee amount, thereby negating the need for Complainant’s Counsel to submit a fee application in accordance with N.J.A.C. 5:105-2.13. Therefore, no further adjudication is required.

Prepared By: Samuel A. Rosado
Staff Attorney

May 23, 2023



State of New Jersey
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101 SOUTH BROAD STREET
PO BOX 819
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PHILIP D. MURPHY
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LT. GOVERNOR SHEILA Y. OLIVER
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INTERIM ORDER

March 28, 2023 Government Records Council Meeting

Tom Maciejewski
Complainant

Complaint No. 2020-110

v.

Berkeley Heights Board of Education (Union)
Custodian of Record

At the March 28, 2023 public meeting, the Government Records Council (“Council”) considered the March 21, 2023 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The current Custodian did not fully comply with the Council’s January 31, 2023 Interim Order. Specifically, although he provided the records and certified confirmation of compliance to the Executive Director, he failed to provide same within the extended time frame.
2. The original Custodian violated OPRA by withholding from access portions of the responsive records. N.J.S.A. 47:1A-6. Further, the current Custodian failed to comply with the Council’s January 31, 2023 Interim Order based on timeliness issues. However, the current Custodian ultimately provided responsive records, and lawfully withheld a portion of same. 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 original Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.
3. Pursuant to the Council’s January 31, 2023 Interim Order, the Complainant has achieved “the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian’s conduct.” Teeters v. DYFS, 387 N.J. Super. 423, 432 (App. Div. 2006). Additionally, a factual causal nexus exists between the Complainant’s filing of a Denial of Access Complaint and the relief ultimately achieved. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51, 76 (2008). Specifically, the Custodian provided the Complainant with records withheld in their entirety. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney’s fee. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. at 432, and Mason, 196 N.J. at 76. **Based on this determination, the parties shall confer in an effort to decide the amount of reasonable attorney’s fees to be paid to Complainant within**

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

Interim Order Rendered by the
Government Records Council
On The 28th Day of March 2023

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: March 30, 2023

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
March 28, 2023 Council Meeting**

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Custodian of Record: Julie A. Kot³

Request Received by Custodian: November 16, 2019; March 4, 2020

Response Made by Custodian: November 25, 2019; March 13, 2020

GRC Complaint Received: June 4, 2020

Background

January 31, 2023 Council Meeting:

At its January 31, 2023 public meeting, the Council considered the January 24, 2023 *In Camera* Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. The Custodian complied with the Council’s May 31, 2022 Interim Order because she responded in the extended time frame providing records for *in camera* review and simultaneously provided certified confirmation of compliance to the Executive Director.
2. The Custodian’s method of replacing redacted information with blank space for a portion of the provided records was not a “visually obvious method” showing “the

¹ Represented by Walter M. Luers, Esq. of Cohn Lifland, Pearlman, Herrmann & Knopf, LLP (Saddle Brook, NJ).

² Represented by David L. Disler, Esq. of Porzio, Bromberg & Newman, P.C. (Morristown, NJ).

³ The Custodian of Record at the time of the request was Donna Felezola, who retired as of July 1, 2021. The current Custodian of Record is Stephen Hopkins.

specific location of any redacted material in the record” and is thus not appropriate under OPRA. N.J.S.A. 47:1A-5(g); Wolosky v. Andover Reg’l Sch. Dist. (Sussex), GRC Complaint No. 2009-94 (April 2010); Scheeler, Jr. v. City of Cape May (Cape May), GRC Complaint No. 2015-91 (Interim Order dated December 15, 2015).

3. **On the basis of the Council’s determination in this matter, the Custodian shall comply with the Council’s Findings of the *In Camera* Examination set forth in the above table within ten (10) business days from receipt of this Order. Further, the Custodian shall simultaneously deliver⁴ certified confirmation of compliance, in accordance with R. 1:4-4,⁵ to the Executive Director.⁶**
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 February 2, 2023, the Council distributed its Interim Order to all parties. On February 17, 2023, the GRC informed the Custodian that the deadline to respond to the Order had expired and requested a status update on compliance. That same day, Custodian’s Counsel responded to the GRC stating that an extension request was sent on February 15, 2023, seeking a ten (10) day extension of time to respond. Custodian’s Counsel further stated he received the consent from Complainant’s Counsel.

On March 10, 2023, the GRC again requested a status update on compliance, as the extended deadline had expired. On March 11, 2023, Custodian’s Counsel responded to the Order, providing redacted records in accordance with same.

On March 14, 2023, the GRC responded to Custodian’s Counsel, stating the response lacked certified confirmation of compliance with the Executive Director. On March 16, 2023, Custodian’s Counsel provided certified confirmation of compliance to the Executive Director.

⁴ The certified confirmation of compliance, including supporting documentation, may be sent overnight mail, regular mail, e-mail, facsimile, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives it by the deadline.

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

⁶ Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

Analysis

Compliance

At its January 31, 2023 meeting, the Council ordered the Custodian to provide the Complainant with the responsive records with redactions in accordance with the *in camera* review. The Council also ordered the Custodian to submit certified confirmation of compliance, in accordance with R. 1:4-4, to the Executive Director. On February 2, 2023, the Council distributed its Interim Order to all parties, providing the Custodian ten (10) business days to comply with the terms of said Order. Thus, the Custodian's response was due by close of business on February 16, 2023.

On February 15, 2023, the ninth (9th) business day after receipt of the Council's Order, the Custodian sought a ten (10) business day extension of time to respond. However, the current Custodian did not provide a response until March 16, 2023, providing the redacted responsive records. Further, the current Custodian did not provide certified confirmation of compliance until March 16, 2023. Thus, the Custodian did not fully comply due to a timeliness issue.

Therefore, the current Custodian did not fully comply with the Council's January 31, 2023 Interim Order. Specifically, although he provided the records and certified confirmation of compliance to the Executive Director, he failed to provide same within the extended time frame.

Knowing & Willful

OPRA states that “[a] public official, officer, employee or custodian who knowingly and willfully violates [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, shall be subject to a civil penalty . . .” N.J.S.A. 47:1A-11(a). OPRA allows the Council to determine a knowing and willful violation of the law and unreasonable denial of access under the totality of the circumstances. Specifically OPRA states “. . . [i]f the council determines, by a majority vote of its members, that a custodian has knowingly and willfully violated [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, the council may impose the penalties provided for in [OPRA] . . .” N.J.S.A. 47:1A-7(e).

Certain legal standards must be considered when making the determination of whether the Custodian's actions rise to the level of a “knowing and willful” violation of OPRA. The following statements must be true for a determination that the Custodian “knowingly and willfully” violated OPRA: the Custodian's actions must have been much more than negligent conduct (Alston v. City of Camden, 168 N.J. 170, 185 (2001)); the Custodian must have had some knowledge that his actions were wrongful (Fielder v. Stonack, 141 N.J. 101, 124 (1995)); the Custodian's actions must have had a positive element of conscious wrongdoing (Berg v. Reaction Motors Div., 37 N.J. 396, 414 (1962)); the Custodian's actions must have been forbidden with actual, not imputed, knowledge that the actions were forbidden (*id.*; Marley v. Borough of Palmyra, 193 N.J. Super. 271, 294-95 (Law Div. 1983)); 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 original Custodian violated OPRA by withholding from access portions of the responsive records. N.J.S.A. 47:1A-6. Further, the current Custodian failed to comply with the Council's January 31, 2023 Interim Order based on timeliness issues. However, the current Custodian ultimately provided responsive records, and lawfully withheld a portion of same. 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 original Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Prevailing Party Attorney's Fees

OPRA provides that:

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

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

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

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

However, the Court noted in Mason, that Buckhannon is binding only when counsel fee provisions under federal statutes are at issue. 196 N.J. at 72, citing Teeters, 387 N.J. Super. at 429; see, e.g., Baer v. Klagholz, 346 N.J. Super. 79 (App. Div. 2001) (applying Buckhannon to the

federal Individuals with Disabilities Education Act), certif. denied, 174 N.J. 193 (2002). “But in interpreting New Jersey law, we look to state law precedent and the specific state statute before us. When appropriate, we depart from the reasoning of federal cases that interpret comparable federal statutes.” 196 N.J. at 73 (citations omitted).

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

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

[Mason at 73-76.]

The Court in Mason, further held that:

[R]equestors are entitled to attorney's fees under OPRA, absent a judgment or an enforceable consent decree, when they can demonstrate (1) “a factual causal nexus between plaintiff's litigation and the relief ultimately achieved”; and (2) “that the relief ultimately secured by plaintiffs had a basis in law.” Singer v. State, 95 N.J. 487, 495, cert denied, New Jersey v. Singer, 469 U.S. 832 (1984).

[Id. at 76.]

In the instant matter, the Complainant sought legal bills from the Board over a specified period. The original Custodian denied access to the entirety of the records pursuant to OPRA's exemptions for student records and attorney-client privilege. However, the Council held that the original Custodian improperly withheld access to the requested legal bills in their entirety and ordered their production with redactions. Thus, a causal nexus exists between this complaint and the change in the Custodian's conduct. Mason, 196 N.J. at 76. Accordingly, the Complainant is a prevailing party entitled to attorney's fees.

Therefore, pursuant to the Council's January 31, 2023 Interim Order, the Complainant has achieved “the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct.” Teeters, 387 N.J. Super. at 432. Additionally, a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Mason, 196 N.J. at 76. Specifically, the Custodian provided the Complainant with records withheld in their entirety. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. at 432, and Mason, 196 N.J. at 76. **Based on**

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

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The current Custodian did not fully comply with the Council's January 31, 2023 Interim Order. Specifically, although he provided the records and certified confirmation of compliance to the Executive Director, he failed to provide same within the extended time frame.
2. The original Custodian violated OPRA by withholding from access portions of the responsive records. N.J.S.A. 47:1A-6. Further, the current Custodian failed to comply with the Council's January 31, 2023 Interim Order based on timeliness issues. However, the current Custodian ultimately provided responsive records, and lawfully withheld a portion of same. 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 original Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.
3. Pursuant to the Council's January 31, 2023 Interim Order, the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." Teeters v. DYFS, 387 N.J. Super. 423, 432 (App. Div. 2006). Additionally, a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51, 76 (2008). Specifically, the Custodian provided the Complainant with records withheld in their entirety. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. at 432, and Mason, 196 N.J. at 76. **Based on this determination, the parties shall confer in an effort to decide the amount of reasonable attorney's fees to be paid to Complainant within twenty (20) business days. The parties shall promptly notify the GRC in writing if a fee agreement is reached. If the parties cannot agree on the amount of attorney's fees, Complainant's Counsel shall submit a fee application to the Council in accordance with N.J.A.C. 5:105-2.13.**

Prepared By: Samuel A. Rosado
Staff Attorney

March 21, 2023



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Custodian of Record

At the January 31, 2023 public meeting, the Government Records Council (“Council”) considered the January 24, 2023 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian complied with the Council’s May 31, 2022 Interim Order because she responded in the extended time frame providing records for *in camera* review and simultaneously provided certified confirmation of compliance to the Executive Director.
2. The Custodian’s method of replacing redacted information with blank space for a portion of the provided records was not a “visually obvious method” showing “the specific location of any redacted material in the record” and is thus not appropriate under OPRA. N.J.S.A. 47:1A-5(g); Wolosky v. Andover Reg’l Sch. Dist. (Sussex), GRC Complaint No. 2009-94 (April 2010); Scheeler, Jr. v. City of Cape May (Cape May), GRC Complaint No. 2015-91 (Interim Order dated December 15, 2015).
3. **On the basis of the Council’s determination in this matter, the Custodian shall comply with the Council’s Findings of the *In Camera* Examination set forth in the above table within ten (10) business days from receipt of this Order. Further, the Custodian shall simultaneously deliver¹ certified confirmation of compliance, in accordance with R. 1:4-4,² to the Executive Director.³**

¹ The certified confirmation of compliance, including supporting documentation, may be sent overnight mail, regular mail, e-mail, facsimile, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives it by the deadline.

² "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

³ Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

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.

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November 16, 2019 OPRA Request: Copies of legal bills of the Berkeley Heights Board of Education (“Board”) for the last six (6) months.

March 4, 2020 OPRA Request: Copies of all legal bills from October 1, 2019 until the present.

Custodian of Record: Julie A. Kot³

Request Received by Custodian: November 16, 2019; March 4, 2020

Response Made by Custodian: November 25, 2019; March 13, 2020

GRC Complaint Received: June 4, 2020

Records Submitted for *In Camera* Examination: Nine (9) redacted and unredacted copies of attorney invoices held by the Board.

Background

May 31, 2022 Council Meeting:

At its May 31, 2022 public meeting, the Council considered the May 24, 2022 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 GRC must conduct an *in camera* review of invoices responsive to the Complainant’s two (2) OPRA requests to determine the validity of the Custodian’s assertion that the redacted material was exempt from disclosure to protect confidential student information, personnel information, attorney-client privileged information, and information related to collective negotiations and grievances. See N.J.S.A. 47:1A-1.1;

¹ Represented by Walter M. Luers, Esq. of Cohn Lifland, Pearlman, Herrmann & Knopf, LLP (Saddle Brook, NJ).

² Represented by David L. Disler, Esq. of Porzio, Bromberg & Newman, P.C. (Morristown, NJ).

³ The Custodian of Record at the time of the request was Donna Felezzola, who retired as of July 1, 2021.

N.J.S.A. 47:1A-10; L.R. v. Camden City Pub. Sch., 238 N.J. 547 (2019). See Paff v. New Jersey Dep't of Labor, Bd. of Review, 379 N.J. Super. 345, 346 (App. Div. 2005).

2. **The Custodian shall deliver⁴ to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see conclusion No. 1 above), nine (9) copies of the redacted records, a document or redaction index⁵, as well as a legal certification from the Custodian, in accordance with N.J. Court Rules, R. 1:4-4,⁶ that the records provided are the records requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**
3. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
4. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Procedural History:

On June 1, 2022, the Council distributed its Interim Order to all parties. On June 6, 2022, the Custodian requested a two-week extension of time to respond to the Council's Order. On June 6, 2022, the GRC granted the Custodian's request for an extension until June 23, 2022.

On June 23, 2022, the Custodian responded to the Council's Interim Order, providing nine (9) redacted and unredacted copies of the responsive records for *in camera* review. The Custodian also provided certified confirmation of compliance to the Executive Director. The Custodian certified that the records consisted of attorney invoices which were redacted to protect student information, personnel information, attorney-client privileged information, and information related to collective negotiations and grievances.

Analysis

Compliance

At its May 31, 2022 meeting, the Council ordered the Custodian to provide nine (9) redacted and unredacted copies of the responsive legal bills and a document index within five (5) business days from receipt of the Council's Interim Order. The Council also ordered the Custodian to simultaneously provide certified confirmation of compliance to the Executive Director. On June 1, 2022, the Council distributed its Interim Order to all parties, providing the Custodian five (5)

⁴ The *in camera* records may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives them by the deadline.

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

⁶ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

business days to comply with the terms of said Order. Thus, the Custodian's response was due by close of business on June 8, 2022.

On June 6, 2022, the third (3rd) business day after receipt of the Council's Order, the Custodian requested an extension of time to respond, which the GRC granted until June 23, 2022. On June 23, 2022, the Custodian responded to the Council's Order, providing nine (9) redacted and unredacted copies of the requested records, and provided certified confirmation of compliance to the Executive Director. The Custodian also provided a document index, numbering each page of the redacted versions of the records. The document index also appeared to provide a distinct basis(es) for redaction for each line of each page, such as "student records" or "personnel records."

Therefore, the Custodian complied with the Council's May 31, 2022 Interim Order because she responded in the extended time frame providing records for *in camera* review and simultaneously provided certified confirmation of compliance to the Executive Director.

Unlawful Denial of Access

OPRA provides that government records made, maintained, kept on file, or received by a public agency in the course of its official business are subject to public access unless otherwise exempt. N.J.S.A. 47:1A-1.1. A custodian must release all records responsive to an OPRA request "with certain exceptions." N.J.S.A. 47:1A-1. Additionally, OPRA places the burden on a custodian to prove that a denial of access to records is lawful. N.J.S.A. 47:1A-6.

Method of Redaction

Initially, the GRC addresses the Complainant's assertion that a portion of the provided records were not redacted properly. Therefore, the GRC shall address proper redaction methods under OPRA and the Custodian's actions here.

OPRA provides that if a Custodian is "unable to comply with a request for access, then the Custodian shall indicate the specific basis" for noncompliance. N.J.S.A. 47:1A-5(g). In Wolosky v. Andover Reg'l Sch. Dist. (Sussex), GRC Complaint No. 2009-94 (April 2010), the GRC discussed what constitutes an appropriate redaction under OPRA. There, the Council found that "redaction must be accomplished by using a visually obvious method that shows the requestor the specific location of any redacted material in the record." See also Paff v. Borough of Manasquan (Monmouth), GRC Complaint No. 2009-281 (Interim Order dated March 29, 2011).

Later, in Scheeler, Jr. v. City of Cape May (Cape May), GRC Complaint No. 2015-91 (Interim Order dated December 15, 2015), the custodian used a "white-out" method to redact arrest reports. The Council drew a comparison to both Wolosky and Paff in finding that the custodian inappropriately redacted the responsive records. The Council reasoned that "such a method does not show the requestor the specific location of the redacted material or the volume of material redacted; thus, the specific location of the material underlying the redactions made was not visually obvious . . ." Id. at 3.

Here, a portion of the provided records were redacted by removing words and phrases with blank space rather than with black marking. The Complainant argued, and the GRC agrees, that these redactions were not done in a “visually obvious” manner, as required in Wolosky and its progeny. The Custodian’s method of redaction did not provide the Complainant with a clear indication of where and how much material were redacted in those records.

Accordingly, the Custodian’s method of replacing redacted information with blank space for a portion of the provided records was not a “visually obvious method” showing “the specific location of any redacted material in the record” and is thus not appropriate under OPRA. N.J.S.A. 47:1A-5(g); Wolosky, GRC 2009-49; Scheeler, GRC 2015-91.

Student Records

OPRA further provides that:

The provisions of [OPRA] shall not abrogate any exemption of a public record or government record from public access heretofore made pursuant to [OPRA]; any other statute; resolution of either or both Houses of the Legislature; regulation promulgated under the authority of any statute or Executive Order of the Governor; Executive Order of the Governor; Rules of Court; any federal law; federal regulation; or federal order.

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

The regulations of the State Board of Education and the Commissioner define a “student record” as “. . . information related to an individual student *gathered within or outside the school district and maintained within the school district*, regardless of the physical form in which it is maintained.” N.J.A.C. 6A:32-2.1 (emphasis added). The regulations of the State Board of Education and the Commissioner of Education provide that “[o]nly authorized organizations, agencies or persons as defined herein shall have access to student records . . .” to include “persons from outside the school if they have written consent of the parent . . .” N.J.A.C. 6A:32-7.5(e)(14). Finally, the regulations require that “[i]n complying with this section, individuals shall adhere to requirements pursuant to [OPRA] and [FERPA].” N.J.A.C. 6A:32-7.5(g). To this end, the Council has looked to these exceptions in determining whether a complainant can access “student records” in part or whole under OPRA. See *i.e. Martinez v. Edison Bd. of Educ. (Middlesex)*, GRC Complaint No. 2014-126 (May 2015); but see *Inzelbuch v. Lakewood Bd. of Educ. (Ocean)*, GRC Complaint No. 2014-92 (September 2014).

More recently, the Appellate Division addressed OPRA and the disclosure of “student records” in L.R., 452 N.J. Super. 56. In one of the four (4) consolidated cases, the trial court ordered the school district to disclose student records requested under OPRA, with redactions made to all PII. The Appellate Division held that redacting PII from a document does not remove its classification as a “student record.” Id. at 83. The court found that “N.J.A.C. 6A:32-7.5(g)’s does not expressly incorporate FERPA’s provisions for the redaction of PII into the [New Jersey Pupil Records Act (“NJPR”) or its regulations. Moreover, nothing in the NJPR or its

regulations states that sufficiently anonymized documents, with all PII removed, are no longer “student records” under N.J.A.C. 6A:32-1.” Id. at 85.

The court further discussed the interplay between the NJPRA, FERPA and OPRA:

It is reasonable to conclude that N.J.A.C. 6A:32-7.5(g) centrally concerns functionality—a district's *processing* of student record requests from an authorized person or organization. See K.L., supra, 423 N.J. Super. at 350, 32 A.3d 1136 (“In providing access to school records in accordance with N.J.A.C. 6A:32-7.5, school districts must also comply with the requirements of OPRA and FERPA, N.J.A.C. 6A:32-7.5(g).”). For instance, if a school district receives an OPRA request from an authorized person or organization listed under N.J.A.C. 6A:32-7.5(e), then it must process that request in compliance with OPRA and FERPA requirements. Nothing in the plain language of N.J.A.C. 6A:32-7.5(g), however, supersedes or nullifies the limitations of “authorized” parties, as set forth at N.J.A.C. 6A:32-7.5(a) and (e). Hence, we agree with the judge in the Hillsborough case that a requestor cannot gain access to a student record unless the requestor satisfies one of the “[a]uthorized” categories listed in N.J.A.C. 6A:32-7.5(e)(1) through (16).

[Id. at 86-87 (emphasis in original).]⁷

Personnel Records

OPRA further provides that:

Notwithstanding the provisions [OPRA] 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 . . .

[N.J.S.A. 47:1A-10.]

OPRA begins with a presumption against disclosure and “proceeds with a few narrow exceptions that . . . need to be considered.” Kovalcik v. Somerset Cnty. Prosecutor’s Office, 206 N.J. 581, 594 (2011). These are:

[A]n individual’s name, title, position, salary, payroll record, length of service, date of separation and the reason therefore, and the amount and type of any pension received shall be government record;

[P]ersonnel 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

⁷ The Supreme Court of New Jersey subsequently affirmed by equal division noting that “N.J.A.C. 6A:32-7.5(g) confirms that individuals and entities may request student records in accordance with OPRA’s provisions, and that educational agencies must comply with those provisions when they respond to such requests.” L.R., 238 N.J. at 569. Tom Maciejewski v. Berkeley Heights Board of Education (Union), 2020-110 – *In Camera* Findings and Recommendations of the Executive Director 5

official duties of a person duly authorized by this State or the United States, or when authorized by an individual in interest; and

[D]ata 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.

[Id.]

Further, the Council has determined that records involving employee discipline or investigations into employee misconduct are properly classified as personnel records exempt from disclosure under N.J.S.A. 47:1A-10. In Merino v. Borough of Ho-Ho-Kus, GRC Complaint No. 2003-110 (March 2004), the Council found that records of complaints or internal reprimands against a municipal police officer were properly classified as personnel records encompassed within the provisions of N.J.S.A. 47:1A-10. For this reason, the Council concluded that “. . . records of complaints filed against [the police officer] and/or reprimands [the officer] received are not subject to public access.” Id. See also Wares v. Twp. of West Milford (Passaic), GRC Complaint No. 2014-274 (May 2015).

Attorney-Client Communications/Work Product

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

In the context of public entities, the attorney-client privilege extends to communications between the public body, the attorney retained to represent it, necessary intermediaries and agents through whom communications are conveyed, and co-litigants who have employed a lawyer to act for them in a common interest. See Tractenberg v. Twp. of W. Orange, 416 N.J. Super. 354, 376 (App. Div. 2010); In re Env'tl. Ins. Declaratory Judgment Actions, 259 N.J. Super. 308, 313 (App. Div. 1992).

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

In Laporta v. Gloucester Cnty. Bd. of Chosen Freeholders, 340 N.J. Super. 245 (App. Div. 2001), the Appellate Division explained that “[t]he work-product doctrine was first recognized by the Supreme Court of the United States . . . and protects from disclosure those documents and other tangible things that a party or a party’s representative prepares in anticipation of litigation.” Id. at 259 (internal citation omitted). The court went on to determine that a memorandum composed by the County and sent to a Freeholder still fell under the attorney work product exemption because it was “prepared in the context of [County Counsel’s] preparation for the defense of the litigation brought by plaintiff against the County for reinstatement and damages.” Id. at 260.

Collective Negotiations and Grievances

OPRA further provides that a government record does not include any information generated by or on behalf of public employers or public employees in connection with collective negotiations, including documents and statements of strategy or negotiating position. N.J.S.A. 47:1A-1.1.

The GRC conducted an *in camera* examination on the submitted records. The results of this examination are set forth in the following table. The GRC notes that the table identifies only those portions of the invoices where the GRC determined the asserted exemptions do not apply (in whole or in part).

Additionally, the GRC notes that in most of the invoices the Custodian redacted the “file number”, “invoice number”, and/or “matter number”. The GRC does not find that such innocuous information rises to the level of attorney-client privileged information or work product. N.J.S.A. 47:1A-1.1. Moreover, in most of the redacted entries, the Custodian redacted the identities of individuals who communicated with counsel via telephone or e-mail. The GRC has previously held that such information is insufficient to qualify as attorney-client privileged communication without providing more than a conclusory declaration of a stated exemption. See Sauter v. Twp. of Colts Neck (Monmouth), GRC Complaint No. 2016-190 (Interim Order dated January 31, 2019); Luers, Esq. (O.B.O. C.C.) v. Eastern Camden Cnty. Reg’l Sch. Dist., GRC Complaint No. 2015-15 (February 2017). Therefore, in addition to the redactions identified in the following table, the Custodian shall disclose the aforementioned information to the Complainant:

Record or Redaction Number	Record Name/Date	Description of Record or Redaction	Custodian's Explanation/ Citation for Non-disclosure or Redactions	Findings of the <i>In Camera</i> Examination⁸
2020-110-0009	One (1) page of an invoice from Scarinci Hollenbeck dated January 23, 2020.	Entry dated December 17, 2019.	Student Records. <u>N.J.S.A. 47:1A-9(a)</u> ; <u>N.J.A.C. 6A:32-2.1</u> ; <u>L.R.</u> , 238 <u>N.J.</u> 547.	Except for the student's initials, the entry dated December 17, 2019 is not exempt from disclosure as a student record pursuant to <u>L.R.</u> , 238 <u>N.J.</u> 547. Therefore, the Custodian must disclose the redacted information to the Complainant.
2020-110-0011	One (1) page of an invoice from Scarinci Hollenbeck dated January 20, 2020.	Entry dated January 13, 2020. Entry dated January 15, 2020.	Attorney Client Privileged Information / Work Product. <u>N.J.S.A. 47:1A-1.1</u> . Student Records. <u>N.J.S.A. 47:1A-9(a)</u> ; <u>N.J.A.C. 6A:32-2.1</u> ; <u>L.R.</u> , 238 <u>N.J.</u> 547.	Except for the students' initials, both entries are not exempt from disclosure as a student record pursuant to <u>L.R.</u> , 238 <u>N.J.</u> 547. Further, the information is general enough that it does not reveal any legal advice, strategy, or work product and is not exempt from disclosure as attorney-client privileged information pursuant to <u>N.J.S.A. 47:1A-1.1</u> . Therefore, the Custodian must disclose the redacted

⁸ **Unless expressly identified for redaction, everything in the record shall be disclosed.** For purposes of identifying redactions, unless otherwise noted a paragraph/new paragraph begins whenever there is an indentation and/or a skipped space(s). The paragraphs are to be counted starting with the first whole paragraph in each record and continuing sequentially through the end of the record. If a record is subdivided with topic headings, renumbering of paragraphs will commence under each new topic heading. Sentences are to be counted in sequential order throughout each paragraph in each record. Each new paragraph will begin with a new sentence number. If only a portion of a sentence is to be redacted, the word in the sentence which the redaction follows or precedes, as the case may be, will be identified and set off in quotation marks. If there is any question as to the location and/or extent of the redaction, the GRC should be contacted for clarification before the record is redacted. The GRC recommends the redactor make a paper copy of the original record and manually "black out" the information on the copy with a dark colored marker, then provide a copy of the blacked-out record to the requester.

				information to the Complainant.
2020-110-0012	One (1) page of an invoice from Scarinci Hollenbeck dated February 20, 2020.	Undated entry marked with 0.2 billable hours near the top of the page. Entry dated January 22, 2020.	Attorney Client Privileged Information / Work Product. <u>N.J.S.A. 47:1A-1.1.</u> Student Records. <u>N.J.S.A. 47:1A-9(a); N.J.A.C. 6A:32-2.1; L.R., 238 N.J. 547.</u>	Except for the students' initials, both entries are not exempt from disclosure as a student record pursuant to <u>L.R., 238 N.J. 547.</u> Further, the information is general enough that it does not reveal any legal advice, strategy, or work product and is not exempt from disclosure as attorney-client privileged information pursuant to <u>N.J.S.A. 47:1A-1.1.</u> Therefore, the Custodian must disclose the redacted information to the Complainant.
2020-110-0014	One (1) page of an invoice from Scarinci Hollenbeck dated January 20, 2020.	Entry dated January 31, 2020.	Attorney Client Privileged Information / Work Product. <u>N.J.S.A. 47:1A-1.1.</u>	The redacted information is general enough that it does not reveal any legal advice, strategy, or work product and is not exempt from disclosure as attorney-client privileged information pursuant to <u>N.J.S.A. 47:1A-1.1.</u> Therefore, the Custodian must disclose the redacted information to the Complainant.
2020-110-0015	One (1) page invoice from Porzio, Bromberg & Newman, LLC dated November 14, 2019.	Top redaction identifying the matter.	Attorney Client Privileged Information / Work Product. <u>N.J.S.A. 47:1A-1.1.</u>	The redacted information is general enough that it does not reveal any legal advice, strategy, or work product and is not exempt from disclosure as attorney-client privileged information pursuant to <u>N.J.S.A. 47:1A-1.1.</u> Therefore, the Custodian must disclose the redacted

				information to the Complainant.
2020-110-0017 2020-110-0027	One (1) page of an invoice from Porzio, Bromberg & Newman, LLC dated December 13, 2019.	Top redaction identifying the matter. Entries dated November 6, 2019, with 0.6 and 3.2 hours billed.		Regarding the top redaction: the redacted information is general enough that it does not reveal any legal advice, strategy, or work product and is not exempt from disclosure as attorney-client privileged information pursuant to <u>N.J.S.A. 47:1A-1.1</u> . Therefore, the Custodian must disclose the redacted information to the Complainant. Regarding the entries dated November 6, 2019: redacting “OPRA” or the “Open Public Records Act” alone is general enough that it does not reveal any legal advice, strategy, or work product and is not exempt from disclosure as attorney-client privileged information pursuant to <u>N.J.S.A. 47:1A-1.1</u> . Therefore, the Custodian must disclose the redacted information to the Complainant.
2020-110-0018 2020-110-0028	One (1) page of an invoice from Porzio, Bromberg & Newman, LLC dated December 13, 2019.	Entry dated November 19, 2019, with 0.3 hours billed.	Attorney Client Privileged Information / Work Product. <u>N.J.S.A. 47:1A-1.1</u> .	Redacting “OPRA” or the “Open Public Records Act” alone is general enough that it does not reveal any legal advice, strategy, or work product and is not exempt from disclosure as attorney-client privileged information pursuant to <u>N.J.S.A. 47:1A-1.1</u> .

				Therefore, the Custodian must disclose the redacted information to the Complainant.
2020-110-0019 2020-110-0029	One (1) page of an invoice from Porzio, Bromberg & Newman, LLC dated December 13, 2019.	Entry dated November 26, 2019.	Attorney Client Privileged Information / Work Product. <u>N.J.S.A. 47:1A-1.1.</u>	Redacting “OPRA” or the “Open Public Records Act” alone is general enough that it does not reveal any legal advice, strategy, or work product and is not exempt from disclosure as attorney-client privileged information pursuant to <u>N.J.S.A. 47:1A-1.1.</u> Therefore, the Custodian must disclose the redacted information to the Complainant.
2020-110-0021 2020-110-0031	One (1) page of an invoice from Porzio, Bromberg & Newman, LLC dated January 23, 2020.	Top redaction identifying the matter. Entry dated December 12, 2019, with 0.4 hours billed. Entry dated December 17, 2019.	Attorney Client Privileged Information / Work Product. <u>N.J.S.A. 47:1A-1.1.</u>	Regarding the top redaction: the redacted information is general enough that it does not reveal any legal advice, strategy, or work product and is not exempt from disclosure as attorney-client privileged information pursuant to <u>N.J.S.A. 47:1A-1.1.</u> Therefore, the Custodian must disclose the redacted information to the Complainant. Regarding the entries dated December 12, 2019 and December 17, 2019: redacting “OPRA” or the “Open Public Records Act” alone is general enough that it does not reveal any legal advice, strategy, or work product and is not exempt from disclosure as attorney-

				client privileged information pursuant to <u>N.J.S.A. 47:1A-1.1</u> . Therefore, the Custodian must disclose the redacted information to the Complainant.
2020-110-0024 2020-110-0034	One (1) page invoice from Porzio, Bromberg & Newman, LLC dated January 23, 2020.	Top redaction identifying the matter.	Attorney Client Privileged Information / Work Product. <u>N.J.S.A. 47:1A-1.1</u> .	The redacted information is general enough that it does not reveal any legal advice, strategy, or work product and is not exempt from disclosure as attorney-client privileged information pursuant to <u>N.J.S.A. 47:1A-1.1</u> . Therefore, the Custodian must disclose the redacted information to the Complainant.
2020-110-0025	One (1) page invoice from Porzio, Bromberg & Newman, LLC dated November 14, 2019.	Top redaction identifying the matter.	Attorney Client Privileged Information / Work Product. <u>N.J.S.A. 47:1A-1.1</u> .	The redacted information is general enough that it does not reveal any legal advice, strategy, or work product and is not exempt from disclosure as attorney-client privileged information pursuant to <u>N.J.S.A. 47:1A-1.1</u> . Therefore, the Custodian must disclose the redacted information to the Complainant.
2020-110-0027	One (1) page invoice from Porzio, Bromberg & Newman, LLC dated December 13, 2019.	Top redaction identifying the matter.	Attorney Client Privileged Information / Work Product. <u>N.J.S.A. 47:1A-1.1</u> .	The redacted information is general enough that it does not reveal any legal advice, strategy, or work product and is not exempt from disclosure as attorney-client privileged information pursuant to <u>N.J.S.A. 47:1A-1.1</u> . Therefore, the Custodian must disclose the redacted information to the Complainant.

2020-110-0037	One (1) page cover letter from Porzio, Bromberg & Newman, LLC dated May 31, 2019.	Top redaction in the subject heading.	Attorney Client Privileged Information / Work Product. <u>N.J.S.A. 47:1A-1.1.</u>	The redacted information is general enough that it does not reveal any legal advice, strategy, or work product and is not exempt from disclosure as attorney-client privileged information pursuant to <u>N.J.S.A. 47:1A-1.1.</u> Therefore, the Custodian must disclose the redacted information to the Complainant.
2020-110-0040	One (1) page voucher for payment to Porzio, Bromberg & Newman, LLC dated May 31, 2019.	Redaction within the description section.	Attorney Client Privileged Information / Work Product. <u>N.J.S.A. 47:1A-1.1.</u>	The redacted information is general enough that it does not reveal any legal advice, strategy, or work product and is not exempt from disclosure as attorney-client privileged information pursuant to <u>N.J.S.A. 47:1A-1.1.</u> Therefore, the Custodian must disclose the redacted information to the Complainant.
2020-110-0041	One (1) page cover letter from Porzio, Bromberg & Newman, LLC dated May 21, 2019.	Redactions within the subject heading and the first sentence in the body.	Attorney Client Privileged Information / Work Product. <u>N.J.S.A. 47:1A-1.1.</u>	The redacted information is general enough that it does not reveal any legal advice, strategy, or work product and is not exempt from disclosure as attorney-client privileged information pursuant to <u>N.J.S.A. 47:1A-1.1.</u> Therefore, the Custodian must disclose the redacted information to the Complainant.
2020-110-0042	One (1) page invoice from Porzio, Bromberg & Newman, LLC dated	Top redaction in the subject heading.	Attorney Client Privileged Information / Work Product. <u>N.J.S.A. 47:1A-1.1.</u>	The redacted information is general enough that it does not reveal any legal advice, strategy, or work product and is not exempt from disclosure as attorney-client privileged

	May 21, 2019.			information pursuant to <u>N.J.S.A. 47:1A-1.1</u> . Therefore, the Custodian must disclose the redacted information to the Complainant.
2020-110-0047	One (1) page cover letter from Porzio, Bromberg & Newman, LLC dated June 20, 2019.	Redactions within the subject heading and the first sentence in the body.	Attorney Client Privileged Information / Work Product. <u>N.J.S.A. 47:1A-1.1</u> .	The redacted information is general enough that it does not reveal any legal advice, strategy, or work product and is not exempt from disclosure as attorney-client privileged information pursuant to <u>N.J.S.A. 47:1A-1.1</u> . Therefore, the Custodian must disclose the redacted information to the Complainant.
2020-110-0048	One (1) page voucher for payment to Porzio, Bromberg & Newman, LLC dated June 28, 2019.	Redaction within the description section.	Attorney Client Privileged Information / Work Product. <u>N.J.S.A. 47:1A-1.1</u> .	The redacted information is general enough that it does not reveal any legal advice, strategy, or work product and is not exempt from disclosure as attorney-client privileged information pursuant to <u>N.J.S.A. 47:1A-1.1</u> . Therefore, the Custodian must disclose the redacted information to the Complainant.
2020-110-0049	One (1) page cover letter from Porzio, Bromberg & Newman, LLC dated June 20, 2019.	Redactions within the subject heading and the first sentence in the body.	Attorney Client Privileged Information / Work Product. <u>N.J.S.A. 47:1A-1.1</u> .	The redacted information is general enough that it does not reveal any legal advice, strategy, or work product and is not exempt from disclosure as attorney-client privileged information pursuant to <u>N.J.S.A. 47:1A-1.1</u> . Therefore, the Custodian must disclose the redacted information to the Complainant.

2020-110-0050	One (1) page voucher for payment to Porzio, Bromberg & Newman, LLC dated June 28, 2019.	Redaction within the description section.	Attorney Client Privileged Information / Work Product. <u>N.J.S.A. 47:1A-1.1.</u>	The redacted information is general enough that it does not reveal any legal advice, strategy, or work product and is not exempt from disclosure as attorney-client privileged information pursuant to <u>N.J.S.A. 47:1A-1.1.</u> Therefore, the Custodian must disclose the redacted information to the Complainant.
2020-110-0051	One (1) page invoice from Porzio, Bromberg & Newman, LLC dated June 20, 2019.	Top redaction in the subject heading.	Attorney Client Privileged Information / Work Product. <u>N.J.S.A. 47:1A-1.1.</u>	The redacted information is general enough that it does not reveal any legal advice, strategy, or work product and is not exempt from disclosure as attorney-client privileged information pursuant to <u>N.J.S.A. 47:1A-1.1.</u> Therefore, the Custodian must disclose the redacted information to the Complainant.
2020-110-0052	One (1) page invoice from Porzio, Bromberg & Newman, LLC dated June 20, 2019.	Top redaction in the subject heading.	Attorney Client Privileged Information / Work Product. <u>N.J.S.A. 47:1A-1.1.</u>	The redacted information is general enough that it does not reveal any legal advice, strategy, or work product and is not exempt from disclosure as attorney-client privileged information pursuant to <u>N.J.S.A. 47:1A-1.1.</u> Therefore, the Custodian must disclose the redacted information to the Complainant.
2020-110-0054	One (1) page cover letter from Porzio, Bromberg & Newman, LLC dated	First and third redaction in the subject heading.	Attorney Client Privileged Information / Work Product. <u>N.J.S.A. 47:1A-1.1.</u>	The redacted information is general enough that it does not reveal any legal advice, strategy, or work product and is not exempt from disclosure as attorney-client privileged

	June 20, 2019.			information pursuant to <u>N.J.S.A. 47:1A-1.1</u> . Therefore, the Custodian must disclose the redacted information to the Complainant.
2020-110-0055	One (1) page cover letter from Porzio, Bromberg & Newman, LLC dated July 19, 2019.	Redactions within the subject heading and the first sentence in the body.	Attorney Client Privileged Information / Work Product. <u>N.J.S.A. 47:1A-1.1</u> .	The redacted information is general enough that it does not reveal any legal advice, strategy, or work product and is not exempt from disclosure as attorney-client privileged information pursuant to <u>N.J.S.A. 47:1A-1.1</u> . Therefore, the Custodian must disclose the redacted information to the Complainant.
2020-110-0056	One (1) page voucher for payment to Porzio, Bromberg & Newman, LLC dated July 29, 2019.	Redaction within the description section.	Attorney Client Privileged Information / Work Product. <u>N.J.S.A. 47:1A-1.1</u> .	The redacted information is general enough that it does not reveal any legal advice, strategy, or work product and is not exempt from disclosure as attorney-client privileged information pursuant to <u>N.J.S.A. 47:1A-1.1</u> . Therefore, the Custodian must disclose the redacted information to the Complainant.
2020-110-0059	One (1) page cover letter from Porzio, Bromberg & Newman, LLC dated July 19, 2019.	Redactions within the subject heading and the first sentence in the body.	Attorney Client Privileged Information / Work Product. <u>N.J.S.A. 47:1A-1.1</u> .	The redacted information is general enough that it does not reveal any legal advice, strategy, or work product and is not exempt from disclosure as attorney-client privileged information pursuant to <u>N.J.S.A. 47:1A-1.1</u> . Therefore, the Custodian must disclose the redacted information to the Complainant.

2020-110-0060	One (1) page voucher for payment to Porzio, Bromberg & Newman, LLC dated July 29, 2019.	Redaction within the description section.	Attorney Client Privileged Information / Work Product. <u>N.J.S.A. 47:1A-1.1.</u>	The redacted information is general enough that it does not reveal any legal advice, strategy, or work product and is not exempt from disclosure as attorney-client privileged information pursuant to <u>N.J.S.A. 47:1A-1.1.</u> Therefore, the Custodian must disclose the redacted information to the Complainant.
2020-110-0061	One (1) page invoice from Porzio, Bromberg & Newman, LLC dated July 19, 2019.	Top redaction in the subject heading.	Attorney Client Privileged Information / Work Product. <u>N.J.S.A. 47:1A-1.1.</u>	The redacted information is general enough that it does not reveal any legal advice, strategy, or work product and is not exempt from disclosure as attorney-client privileged information pursuant to <u>N.J.S.A. 47:1A-1.1.</u> Therefore, the Custodian must disclose the redacted information to the Complainant.
2020-110-0065	One (1) page invoice from Porzio, Bromberg & Newman, LLC dated July 19, 2019.	Top redaction in the subject heading.	Attorney Client Privileged Information / Work Product. <u>N.J.S.A. 47:1A-1.1.</u>	The redacted information is general enough that it does not reveal any legal advice, strategy, or work product and is not exempt from disclosure as attorney-client privileged information pursuant to <u>N.J.S.A. 47:1A-1.1.</u> Therefore, the Custodian must disclose the redacted information to the Complainant.
2020-110-0066	One (1) page cover letter from Porzio, Bromberg & Newman, LLC dated	First and third redaction in the subject heading.	Attorney Client Privileged Information / Work Product. <u>N.J.S.A. 47:1A-1.1.</u>	The redacted information is general enough that it does not reveal any legal advice, strategy, or work product and is not exempt from disclosure as attorney-client privileged

	August 30, 2019.			information pursuant to <u>N.J.S.A. 47:1A-1.1</u> . Therefore, the Custodian must disclose the redacted information to the Complainant.
2020-110-0067	One (1) page cover letter from Porzio, Bromberg & Newman, LLC dated August 23, 2019.	Redactions within the subject heading and the first sentence in the body.	Attorney Client Privileged Information / Work Product. <u>N.J.S.A. 47:1A-1.1</u> .	The redacted information is general enough that it does not reveal any legal advice, strategy, or work product and is not exempt from disclosure as attorney-client privileged information pursuant to <u>N.J.S.A. 47:1A-1.1</u> . Therefore, the Custodian must disclose the redacted information to the Complainant.
2020-110-0068	One (1) page voucher for payment to Porzio, Bromberg & Newman, LLC dated August 30, 2019.	Redaction within the description section.	Attorney Client Privileged Information / Work Product. <u>N.J.S.A. 47:1A-1.1</u> .	The redacted information is general enough that it does not reveal any legal advice, strategy, or work product and is not exempt from disclosure as attorney-client privileged information pursuant to <u>N.J.S.A. 47:1A-1.1</u> . Therefore, the Custodian must disclose the redacted information to the Complainant.
2020-110-0073	One (1) page invoice from Porzio, Bromberg & Newman, LLC dated August 23, 2019.	Top redaction in the subject heading.	Attorney Client Privileged Information / Work Product. <u>N.J.S.A. 47:1A-1.1</u> .	The redacted information is general enough that it does not reveal any legal advice, strategy, or work product and is not exempt from disclosure as attorney-client privileged information pursuant to <u>N.J.S.A. 47:1A-1.1</u> . Therefore, the Custodian must disclose the redacted information to the Complainant.

2020-110-0078	One (1) page voucher for payment to Porzio, Bromberg & Newman, LLC dated September 30, 2019.	Redaction within the description section.	Attorney Client Privileged Information / Work Product. <u>N.J.S.A. 47:1A-1.1.</u>	The redacted information is general enough that it does not reveal any legal advice, strategy, or work product and is not exempt from disclosure as attorney-client privileged information pursuant to <u>N.J.S.A. 47:1A-1.1.</u> Therefore, the Custodian must disclose the redacted information to the Complainant.
2020-110-0079	One (1) page cover letter from Porzio, Bromberg & Newman, LLC dated September 19, 2019.	Redactions within the subject heading and the first sentence in the body.	Attorney Client Privileged Information / Work Product. <u>N.J.S.A. 47:1A-1.1.</u>	The redacted information is general enough that it does not reveal any legal advice, strategy, or work product and is not exempt from disclosure as attorney-client privileged information pursuant to <u>N.J.S.A. 47:1A-1.1.</u> Therefore, the Custodian must disclose the redacted information to the Complainant.
2020-110-0083	One (1) page invoice from Porzio, Bromberg & Newman, LLC dated September 19, 2019.	Top redaction in the subject heading.	Attorney Client Privileged Information / Work Product. <u>N.J.S.A. 47:1A-1.1.</u>	The redacted information is general enough that it does not reveal any legal advice, strategy, or work product and is not exempt from disclosure as attorney-client privileged information pursuant to <u>N.J.S.A. 47:1A-1.1.</u> Therefore, the Custodian must disclose the redacted information to the Complainant.
2020-110-0088	One (1) page voucher for payment to Porzio, Bromberg & Newman, LLC dated	Redaction within the description section.	Attorney Client Privileged Information / Work Product. <u>N.J.S.A. 47:1A-1.1.</u>	The redacted information is general enough that it does not reveal any legal advice, strategy, or work product and is not exempt from disclosure as attorney-client privileged

	October 31, 2019.			information pursuant to <u>N.J.S.A. 47:1A-1.1</u> . Therefore, the Custodian must disclose the redacted information to the Complainant.
2020-110-0089	One (1) page cover letter from Porzio, Bromberg & Newman, LLC dated October 24, 2019.	Redactions within the subject heading and the first sentence in the body.	Attorney Client Privileged Information / Work Product. <u>N.J.S.A. 47:1A-1.1</u> .	The redacted information is general enough that it does not reveal any legal advice, strategy, or work product and is not exempt from disclosure as attorney-client privileged information pursuant to <u>N.J.S.A. 47:1A-1.1</u> . Therefore, the Custodian must disclose the redacted information to the Complainant.
2020-110-0091	One (1) page invoice from Porzio, Bromberg & Newman, LLC dated October 24, 2019.	Top redaction in the subject heading. Entry dated September 16, 2019.	Attorney Client Privileged Information / Work Product. <u>N.J.S.A. 47:1A-1.1</u> .	Regarding the top redaction: the redacted information is general enough that it does not reveal any legal advice, strategy, or work product and is not exempt from disclosure as attorney-client privileged information pursuant to <u>N.J.S.A. 47:1A-1.1</u> . Therefore, the Custodian must disclose the redacted information to the Complainant. Regarding the entry dated September 16, 2019: redacting “OPRA” or the “Open Public Records Act” alone is general enough that it does not reveal any legal advice, strategy, or work product and is not exempt from disclosure as attorney-client privileged

				information pursuant to <u>N.J.S.A. 47:1A-1.1</u> . Therefore, the Custodian must disclose the redacted information to the Complainant.
2020-110-0093	One (1) page of an invoice from Scarinci Hollenbeck dated October 22, 2019.	Top redaction identifying the matter.	Attorney Client Privileged Information / Work Product. <u>N.J.S.A. 47:1A-1.1</u> .	The redacted information is general enough that it does not reveal any legal advice, strategy, or work product and is not exempt from disclosure as attorney-client privileged information pursuant to <u>N.J.S.A. 47:1A-1.1</u> . Therefore, the Custodian must disclose the redacted information to the Complainant.
2020-110-0100	One (1) page of an invoice from Scarinci Hollenbeck dated September 17, 2019.	Top redaction identifying the matter.	Attorney Client Privileged Information / Work Product. <u>N.J.S.A. 47:1A-1.1</u> .	The redacted information is general enough that it does not reveal any legal advice, strategy, or work product and is not exempt from disclosure as attorney-client privileged information pursuant to <u>N.J.S.A. 47:1A-1.1</u> . Therefore, the Custodian must disclose the redacted information to the Complainant.
2020-110-0109	One (1) page of an invoice from Scarinci Hollenbeck dated August 14, 2019.	Top redaction identifying the matter.	Attorney Client Privileged Information / Work Product. <u>N.J.S.A. 47:1A-1.1</u> .	The redacted information is general enough that it does not reveal any legal advice, strategy, or work product and is not exempt from disclosure as attorney-client privileged information pursuant to <u>N.J.S.A. 47:1A-1.1</u> . Therefore, the Custodian must disclose the redacted information to the Complainant.

2020-110-0119	One (1) page of an invoice from Scarinci Hollenbeck dated July 16, 2019.	Top redaction identifying the matter.	Attorney Client Privileged Information / Work Product. <u>N.J.S.A. 47:1A-1.1.</u>	The redacted information is general enough that it does not reveal any legal advice, strategy, or work product and is not exempt from disclosure as attorney-client privileged information pursuant to <u>N.J.S.A. 47:1A-1.1.</u> Therefore, the Custodian must disclose the redacted information to the Complainant.
2020-110-0125	One (1) page of an invoice from Scarinci Hollenbeck dated June 20, 2019.	Top redaction identifying the matter.	Attorney Client Privileged Information / Work Product. <u>N.J.S.A. 47:1A-1.1.</u>	The redacted information is general enough that it does not reveal any legal advice, strategy, or work product and is not exempt from disclosure as attorney-client privileged information pursuant to <u>N.J.S.A. 47:1A-1.1.</u> Therefore, the Custodian must disclose the redacted information to the Complainant.

Thus, a portion of the Custodian’s redactions were invalid on the basis of protecting attorney-client privileged communications and/or student records. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-9(a); N.J.A.C. 6A:32-2.1; L.R., 238 N.J. 547. On the basis of the Council’s determination in this matter, the Custodian shall comply with the Council’s findings of the *in camera* examination set forth in the above table.

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 Custodian complied with the Council's May 31, 2022 Interim Order because she responded in the extended time frame providing records for *in camera* review and simultaneously provided certified confirmation of compliance to the Executive Director.
2. The Custodian's method of replacing redacted information with blank space for a portion of the provided records was not a "visually obvious method" showing "the specific location of any redacted material in the record" and is thus not appropriate under OPRA. N.J.S.A. 47:1A-5(g); Wolosky v. Andover Reg'l Sch. Dist. (Sussex), GRC Complaint No. 2009-94 (April 2010); Scheeler, Jr. v. City of Cape May (Cape May), GRC Complaint No. 2015-91 (Interim Order dated December 15, 2015).
3. **On the basis of the Council's determination in this matter, the Custodian shall comply with the Council's Findings of the *In Camera* Examination set forth in the above table within ten (10) business days from receipt of this Order. Further, the Custodian shall simultaneously deliver⁹ certified confirmation of compliance, in accordance with R. 1:4-4,¹⁰ to the Executive Director.¹¹**
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

January 24, 2023

⁹ The certified confirmation of compliance, including supporting documentation, may be sent overnight mail, regular mail, e-mail, facsimile, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives it by the deadline.

¹⁰ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

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



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

May 31, 2022 Government Records Council Meeting

Tom Maciejewski
Complainant

Complaint No. 2020-110

v.

Berkeley Heights Board of Education (Union)
Custodian of Record

At the May 31, 2022 public meeting, the Government Records Council (“Council”) considered the May 24, 2022 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 GRC must conduct an *in camera* review of invoices responsive to the Complainant’s two (2) OPRA requests to determine the validity of the Custodian’s assertion that the redacted material was exempt from disclosure to protect confidential student information, personnel information, attorney-client privileged information, and information related to collective negotiations and grievances. See N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-10; L.R. v. Camden City Pub. Sch., 238 N.J. 547 (2019). See Paff v. New Jersey Dep’t of Labor, Bd. of Review, 379 N.J. Super. 345, 346 (App. Div. 2005).
2. **The Custodian shall deliver¹ to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see conclusion No. 1 above), nine (9) copies of the redacted records, a document or redaction index², as well as a legal certification from the Custodian, in accordance with N.J. Court Rules, R. 1:4-4,³ that the records provided are the records requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council’s Interim Order.**
3. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian’s compliance with the Council’s Interim Order.

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."

4. 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 31st Day of May 2022

Robin Berg Tabakin, Esq., Chair
Government Records Council

I attest the foregoing is a true and accurate record of the Government Records Council.

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: June 1, 2022

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
May 31, 2022 Council Meeting**

**Tom Maciejewski¹
Complainant**

GRC Complaint No. 2020-110

v.

**Berkeley Heights Board of Education (Union)²
Custodial Agency**

Records Relevant to Complaint:

November 16, 2019 OPRA Request: Copies of legal bills of the Berkeley Heights Board of Education (“Board”) for the last six (6) months.

March 4, 2020 OPRA Request: Copies of all legal bills from October 1, 2019 until the present.

Custodian of Record: Julie A. Kot³

Request Received by Custodian: November 16, 2019; March 4, 2020

Response Made by Custodian: November 25, 2019; March 13, 2020

GRC Complaint Received: June 4, 2020

Background⁴

Request and Response:

On November 16, 2019, the Complainant submitted an Open Public Records Act (“OPRA”) request to the original Custodian seeking the above-mentioned records. On November 25, 2019, the original Custodian responded in writing providing responsive records via e-mail. The original Custodian stated that the records were redacted in accordance with OPRA’s attorney-client privilege exemption. N.J.S.A. 47:1A-1.1.

On March 4, 2020, the Complainant submitted an OPRA request to the original Custodian seeking the above-mentioned records. On March 13, 2020, the original Custodian responded in writing providing responsive records via e-mail, containing redactions in accordance with OPRA’s attorney-client privilege exemption. N.J.S.A. 47:1A-1.1.

¹ Represented by Walter M. Luers, Esq. of Cohn Lifland, Pearlman, Herrmann & Knopf, LLP (Saddle Brook, NJ).

² Represented by David L. Disler, Esq. of Porzio, Bromberg & Newman, P.C. (Morristown, NJ).

³ The Custodian of Record at the time of the request was Donna Felezzola, who retired as of July 1, 2021.

⁴ The parties may have submitted additional correspondence or made additional statements/assertions in the submissions identified herein. However, the Council includes in the Findings and Recommendations of the Executive Director the submissions necessary and relevant for the adjudication of this complaint.

Denial of Access Complaint:

On June 4, 2020, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that the redactions made to the responsive records for both requests were overly broad. The Complainant contended that courts generally do not treat attorney invoices as privileged. See Hunterdon County Policeman’s Benevolent Assoc. Local 188 v. Twp. of Franklin, 286 N.J. Super. 389, 394 (App. Div. 1996). The Complainant also asserted that in Courier Post v. Lenape Reg’l High Sch. Dist., 360 N.J. Super. 191 (Law Div. 2002), the court opined that privileged information should not appear in attorney invoices for services rendered to school districts.

The Complainant further asserted that the invoices were not confidential under the attorney work product doctrine. The Complainant argued that time records are prepared in the regular course of business and not in anticipation of pending litigation. See N.J. Court Rules, R. 4:10-2(c); Miller v. J.B. Hunt Transport, 339 N.J. Super. 144, 148 (App. Div. 2001).

The Complainant requested the GRC to order the Custodian to prepare a Vaughn⁵ index and submit the invoices in dispute for *in camera* review. Paff v. New Jersey Dep’t of Labor, Bd. of Review, 379 N.J. Super. 345, 355 (App. Div. 2005). The Complainant also noted that the redactions made to the record were not made in a visually obvious matter. See Wolosky v. Twp. of Harding (Morris), GRC Complaint No. 2010-221 (June 2012).

Statement of Information:⁶

On April 19, 2022, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that the original Custodian received the Complainant’s OPRA request on November 16, 2019 and March 4, 2020. The Custodian certified that the original Custodian responded in writing on November 25, 2019 and March 13, 2020, providing responsive records with the appropriate redactions.

The Custodian asserted that the responsive records were redacted to protect confidential student information, personnel information, attorney-client privileged information, and information related to collective negotiations and grievances. See N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-10; L.R. v. Camden City Pub. Sch., 238 N.J. 547 (2019).

The Custodian asserted that the requested invoices contained information relating to children other than the Complainant’s, and therefore required to be an “authorized person” to have access to the records. N.J.A.C. 6A:32-7.5. The Custodian argued that since he did not have any written permission from a parent, guardian, adult students or a court order, he was not an “authorized person.”

⁵ The term *Vaughn* index is derived from Vaughn v. Rosen, 484 F.2d 820, 826-28, 157 U.S. App. D.C. 340 (D.C. Cir. 1973), cert. denied, 415 U.S. 977, 94 S. Ct. 1564, 39 L. Ed. 2d 873 (1974). See Paff v. Div. of Law, 412 N.J. Super. 140, 161 n. 9, 988 A.2d 1239 (App. Div. 2010), certif. denied, 202 N.J. 45, 994 A.2d 1040 (2010). A *Vaughn* index provides details justifying non-disclosure of documents based on an asserted privileged. Ibid.

⁶ On June 15, 2020, the complaint was referred to mediation. On March 2, 2022, the complaint was referred back for adjudication.

The Custodian next asserted that the invoices contained personnel information protected from disclosure under N.J.S.A. 47:1A-10. The Custodian contended that portions of the invoices were redacted to protect narratives within the time entries.

The Custodian further argued that the redactions were made to protect attorney-client privileged information and attorney work product. N.J.S.A. 47:1A-1.1. The Custodian asserted that the invoices contained line entries that encompassed confidential information, trial strategy, or work product, and argued that the redactions were necessary and proper to protect the privilege and doctrine.

Lastly, the Custodian argued that portions of the invoices were redacted to protect collective negotiations and grievances. N.J.S.A. 47:1A-1.1.

Analysis

Unlawful Denial of Access

OPRA provides that government records made, maintained, kept on file, or received by a public agency in the course of its official business are subject to public access unless otherwise exempt. N.J.S.A. 47:1A-1.1. A custodian must release all records responsive to an OPRA request “with certain exceptions.” N.J.S.A. 47:1A-1. Additionally, OPRA places the burden on a custodian to prove that a denial of access to records is lawful pursuant to N.J.S.A. 47:1A-6.

In Paff, 379 N.J. Super. 346, the complainant appealed a final decision of the Council⁷ that accepted the custodian’s legal conclusion for the denial of access without further review. The Appellate Division noted that “OPRA contemplates the GRC’s meaningful review of the basis for an agency’s decision to withhold government records . . . When the GRC decides to proceed with an investigation and hearing, the custodian may present evidence and argument, but the GRC is not required to accept as adequate whatever the agency offers.” Id. The court stated that:

[OPRA] also contemplates the GRC’s *in camera* review of the records that an agency asserts are protected when such review is necessary to a determination of the validity of a claimed exemption. Although OPRA subjects the GRC to the provisions of the ‘Open Public Meetings Act,’ N.J.S.A. 10:4-6 to -21, it also provides that the GRC ‘may go into closed session during that portion of any proceeding during which the contents of a contested record would be disclosed.’ N.J.S.A. 47:1A-7(f). This provision would be unnecessary if the Legislature did not intend to permit *in camera* review.

[Id. at 355.]

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

⁷ Paff v. NJ Dep’t of Labor, Bd. of Review, GRC Complaint No. 2003-128 (October 2005).

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 matter before the Council, the Complainant's two (2) OPRA requests sought access to invoices from June 2019 through March 2020. The Custodian ultimately disclosed copies of invoices for the requested periods with redactions, citing the attorney-client privilege. N.J.S.A. 47:1A-1.1. This complaint followed, wherein the Complainant argued in part that the Custodian unlawfully redacted the responsive invoices. In the SOI, the Custodian noted that the redacted material included not just attorney-client privileged information, but also work product, student records, personnel information, and information related to collective negotiations and grievances.

Upon review of the evidence of record in the instant complaint, the GRC cannot determine whether the Custodian properly denied access to those redactions contained within the invoices. Although the disclosed invoices were included in the both the Denial of Access Complaint and SOI, the GRC cannot independently determine the validity of those redactions. For these reasons, a "meaningful review" is necessary to determine whether the redacted invoices fall within the asserted exemption. Paff, 379 N.J. Super. at 355. Further, the GRC has routinely reviewed invoices *in camera* in complaints with facts similar to the present complaint. See e.g. Law Offices of Walter M. Luers, LLC v. Eastern Camden Cnty. Reg'l Sch. Dist., GRC Complaint No. 2015-15 (Interim Order dated October 27, 2015).

Therefore, the GRC must conduct an *in camera* review of invoices responsive to the Complainant's two (2) OPRA requests to determine the validity of the Custodian's assertion that the redacted material was exempt from disclosure to protect confidential student information, personnel information, attorney-client privileged information, and information related to collective negotiations and grievances. See N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-10; L.R., 238 N.J. 547. See Paff, 379 N.J. Super. at 346.

Knowing & Willful

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

Prevailing Party Attorney's Fees

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

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The GRC must conduct an *in camera* review of invoices responsive to the Complainant's two (2) OPRA requests to determine the validity of the Custodian's assertion that the redacted material was exempt from disclosure to protect confidential student information, personnel information, attorney-client privileged information, and information related to collective negotiations and grievances. See N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-10; L.R. v. Camden City Pub. Sch., 238 N.J. 547 (2019). See Paff v. New Jersey Dep't of Labor, Bd. of Review, 379 N.J. Super. 345, 346 (App. Div. 2005).
2. **The Custodian shall deliver⁸ to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see conclusion No. 1 above), nine (9) copies of the redacted records, a document or redaction index⁹, as well as a legal certification from the Custodian, in accordance with N.J. Court Rules, R. 1:4-4,¹⁰ that the records provided are the records requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**
3. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
4. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

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Staff Attorney

May 24, 2022

⁸ 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.

⁹ The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

¹⁰ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."