



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

Stephen J. Christiano, Esq.
(o/b/o Ronald Bligh)
Complainant

Complaint No. 2021-220

v.

West Orange Board of Education (Essex)
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**

**Stephen J. Christiano, Esq.
(on Behalf of Ronald Bligh)¹
Complainant**

GRC Complaint No. 2021-220

v.

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

Records Relevant to Complaint: Electronic copies via e-mail of: “All e-mails from January 1, 2021 to the present by and between Trish Dellosso and Micaela Bennett, Ben Avery, and Barry Geltzeiler relative to Ronald Bligh and all e-mails from the same time period by and between Dr. Scott Cascone and Micaela Bennett, Ben Avery and Barry Geltzeiler regarding Ronald Bligh.”

Custodian of Record: Tonya Flowers

Request Received by Custodian: June 28, 2021

Response Made by Custodian: August 4, 2021

GRC Complaint Received: September 20, 2021

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 Custodian complied with the Council’s February 28, 2023 Interim Order because she responded in the prescribed time frame providing records and simultaneously provided certified confirmation of compliance to the Executive Director.
2. Although the Custodian unlawfully denied access to portions of the requested e-mails, she lawfully denied access to the included attachment under OPRA. Further, the Custodian complied with the Counsel’s November 9, 2022 and February 28, 2023 Interim Orders. Additionally, the evidence of record does not indicate that the Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was

¹ The Complainant represents Ronald Bligh.

² Represented by Bradley D. Tishman, Esq., of Cleary, Giacobbe, Alfieri, Jacobs, LLC (Oakland, NJ).

intentional and deliberate. Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

3. Pursuant to the Council's February 28, 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 11, 2023, the Custodian's Counsel e-mailed the GRC, with copy to the Complainant, stating that the parties amicably resolved the fee issue. That same day, the GRC responded to Custodian's Counsel requesting confirmation of the executed settlement agreement, or confirmation from the Complainant directly. Custodian's Counsel replied stating that the settlement agreement was scheduled for approval with the West Orange Board of Education ("Board") at the end of the month.

On April 27, 2023, Custodian's Counsel confirmed via e-mail that the fee issue was amicably resolved by providing a copy of the signed settlement agreement between the parties.

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 11, 2023, Custodian’s Counsel contacted the GRC stating that a settlement had been reached between the parties. On April 27, 2023, Custodian’s Counsel provided the GRC with a signed copy of the settlement agreement between the parties on the attorney fee issue.

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
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

March 28, 2023 Government Records Council Meeting

Stephen J. Christiano, Esq.
(o/b/o Ronald Bligh)
Complainant

Complaint No. 2021-220

v.

West Orange Board of Education (Essex)
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 Custodian complied with the Council’s February 28, 2023 Interim Order because she responded in the prescribed time frame providing records and simultaneously provided certified confirmation of compliance to the Executive Director.
2. Although the Custodian unlawfully denied access to portions of the requested e-mails, she lawfully denied access to the included attachment under OPRA. Further, the Custodian complied with the Counsel’s November 9, 2022 and February 28, 2023 Interim Orders. Additionally, the evidence of record does not indicate that the Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.
3. Pursuant to the Council’s February 28, 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**

**Stephen J. Christiano, Esq.
(on Behalf of Ronald Bligh)¹
Complainant**

GRC Complaint No. 2021-220

v.

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

Records Relevant to Complaint: Electronic copies via e-mail of: “All e-mails from January 1, 2021 to the present by and between Trish Dellosso and Micaela Bennett, Ben Avery, and Barry Geltzeiler relative to Ronald Bligh and all e-mails from the same time period by and between Dr. Scott Cascone and Micaela Bennett, Ben Avery and Barry Geltzeiler regarding Ronald Bligh.”

Custodian of Record: Tonya Flowers

Request Received by Custodian: June 28, 2021

Response Made by Custodian: August 4, 2021

GRC Complaint Received: September 20, 2021

Background

February 28, 2023 Council Meeting:

At its February 28, 2023 public meeting, the Council considered the February 21, 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 the amended findings and recommendations. The Council, therefore, found that:

1. The Custodian complied with the Council’s November 9, 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. **On the basis of the Council’s determination in this matter, the Custodian shall comply with the Council’s Findings of the *In Camera* Examination set forth in the above table within five (5) business days from receipt of this Order. Further, the**

¹ The Complainant represents Ronald Bligh.

² Represented by Bradley D. Tishman, Esq., of Cleary, Giacobbe, Alfieri, Jacobs, LLC (Oakland, NJ).

Custodian shall simultaneously deliver³ certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,⁴ to the Executive Director.⁵

3. The Custodian must disclose all other portions of the responsive e-mails to the Complainant (*i.e.*, sender, recipients, date, time, subject, and salutations where applicable). This disclosure should take into account that portion of the June 6, 2021 e-mail which should be disclosed, as per the *In Camera* Examination table above. As to that portion of the responsive e-mail chains, the Custodian has unlawfully denied access. See Ray v. Freedom Acad. Charter Sch. (Camden), GRC Complaint No. 2009-185 (Interim Order dated August 24, 2010).
4. **The Custodian shall comply with conclusion No. 3 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, if applicable. Further, the Custodian shall simultaneously deliver⁶ certified confirmation of compliance, in accordance with R. 1:4-4, to the Executive Director.**
5. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
6. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Procedural History:

On March 2, 2023, the Council distributed its Interim Order to all parties. On March 8, 2023, the Custodian responded to the Council's Interim Order. The Custodian certified that she provided the Complainant with the requested e-mail correspondence with redactions in accordance with the Order. The Custodian also provided certified confirmation of compliance to the Executive Director.

³ 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.

⁴ "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."

⁵ 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.

⁶ 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.

Analysis

Compliance

At its February 28, 2023 meeting, the Council ordered the Custodian to provide the Complainant with the requested e-mails with redactions in accordance with the Executive Order. The Council also ordered the Custodian to submit certified confirmation of compliance, in accordance with R. 1:4-4, to the Executive Director. On March 2, 2023, the Council distributed its Interim Order to all parties, providing the Custodian five (5) business days to comply with the terms of said Order. Thus, the Custodian's response was due by close of business on March 9, 2023.

On March 8, 2023, the fourth (4th) business day after receipt of the Council's Order, the Custodian responded in writing, providing certified confirmation of compliance to the Executive Director. The Custodian certified that she provided the Complainant with the redacted e-mails that same day in accordance with the Order.

Therefore, the Custodian complied with the Council's February 28, 2023 Interim Order because she responded in the prescribed time frame providing records and simultaneously provided certified confirmation of compliance to the Executive Director.

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)).

Although the Custodian unlawfully denied access to portions of the requested e-mails, she lawfully denied access to the included attachment under OPRA. Further, the Custodian complied with the Counsel's November 9, 2022 and February 28, 2023 Interim Orders. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Prevailing Party Attorney's Fees

OPRA provides that:

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

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

In Teeters v. DYFS, 387 N.J. Super. 423 (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 e-mail correspondence between various parties pertaining to his client. The Custodian denied access to the entirety of the records pursuant to OPRA’s exemptions for personnel records, workplace harassment, or the privacy interests exemption. However, the Council held that the Custodian improperly withheld access to the requested e-mails 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 February 28, 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. 432, and Mason, 196 N.J. 51. **Based on this determination, the parties shall confer in an effort to decide the amount of reasonable**

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

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian complied with the Council's February 28, 2023 Interim Order because she responded in the prescribed time frame providing records and simultaneously provided certified confirmation of compliance to the Executive Director.
2. Although the Custodian unlawfully denied access to portions of the requested e-mails, she lawfully denied access to the included attachment under OPRA. Further, the Custodian complied with the Counsel's November 9, 2022 and February 28, 2023 Interim Orders. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.
3. Pursuant to the Council's February 28, 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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INTERIM ORDER

February 28, 2023 Government Records Council Meeting

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At the February 28, 2023 public meeting, the Government Records Council (“Council”) considered the February 21, 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 November 9, 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. **On the basis of the Council’s determination in this matter, the Custodian shall comply with the Council’s Findings of the *In Camera* Examination set forth in the above table within five (5) business days from receipt of this Order. Further, the Custodian shall simultaneously deliver¹ certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,² to the Executive Director.³**
3. The Custodian must disclose all other portions of the responsive e-mails to the Complainant (*i.e.*, sender, recipients, date, time, subject, and salutations where applicable). This disclosure should take into account that portion of the June 6, 2021 e-mail which should be disclosed, as per the *In Camera* Examination table above. As to that portion of the responsive e-mail chains, the Custodian has unlawfully denied access. See Ray v. Freedom Acad. Charter Sch. (Camden), GRC Complaint No. 2009-185 (Interim Order dated August 24, 2010).

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 Custodian shall comply with conclusion No. 3 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, if applicable. Further, the Custodian shall simultaneously deliver⁴ certified confirmation of compliance, in accordance with R. 1:4-4, to the Executive Director.**
5. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
6. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Interim Order Rendered by the
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On The 28th Day of February 2023

Robin Berg Tabakin, Esq., Chair
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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 2, 2023

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**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

***In Camera* Findings and Recommendations of the Executive Director
February 28, 2023 Council Meeting**

**Stephen J. Christiano, Esq.
(on Behalf of Ronald Bligh)¹
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v.

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

Records Relevant to Complaint: Electronic copies via e-mail of: “All e-mails from January 1, 2021 to the present by and between Trish Dellosso and Micaela Bennett, Ben Avery, and Barry Geltzeiler relative to Ronald Bligh and all e-mails from the same time period by and between Dr. Scott Cascone and Micaela Bennett, Ben Avery and Barry Geltzeiler regarding Ronald Bligh.”

Custodian of Record: Tonya Flowers
Request Received by Custodian: June 28, 2021
Response Made by Custodian: August 4, 2021
GRC Complaint Received: September 20, 2021

Records Submitted for *In Camera* Examination: Nine (9) copies of e-mail correspondence and an Excel spreadsheet withheld from disclosure under the personnel records, workplace harassment, and/or privacy interest exemptions. See N.J.S.A. 47:1A-10; N.J.S.A. 47:1A.1-1; N.J.S.A. 47:1A-1.

Background

November 9, 2022 Council Meeting:

At its November 9, 2022 public meeting, the Council considered the October 27, 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 the withheld records responsive to the Complainant’s OPRA request to determine the validity of the Custodian’s assertion that the denial of access was valid under the personnel records exemption, workplace harassment exemptions, or the privacy interests exemption. See N.J.S.A. 47:1A-10;

¹ The Complainant represents Ronald Bligh.

² Represented by Bradley D. Tishman, Esq., of Cleary, Giacobbe, Alfieri, Jacobs, LLC (Oakland, NJ).
Stephen J. Christiano, Esq. (on Behalf of Ronald Bligh) v. West Orange Board of Education (Essex), 2021-220 – *In Camera* Findings and Recommendations of the Executive Director

N.J.S.A. 47:1A.1-1; N.J.S.A. 47:1A-1; Paff v. N.J. Dep't of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005).

2. **The Custodian shall deliver³ to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see conclusion No. 1 above), a document or redaction index⁴, as well as a legal certification from the Custodian, in accordance with N.J. Court Rules, R. 1:4-4,⁵ 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 November 10, 2022, the Council distributed its Interim Order to all parties on. On November 17, 2022, the Custodian requested an extension of time until November 30, 2022 to respond to the Interim Order. On November 18, 2022, the GRC granted the Custodian's extension request.

On November 30, 2022, the Custodian responded to the Council's Interim Order. The Custodian provided to the GRC nine (9) copies of the required two (2) e-mail chains and an attached Excel spreadsheet. The Custodian also provided certified confirmation of compliance to the Executive Director.

Analysis

Compliance

At its November 9, 2022 meeting, the Council ordered the Custodian to provide nine (9) copies of the records withheld from disclosure along with a document index within five (5) business days from receipt of the Council's Interim Order. The Council also required the Custodian to simultaneously provide certified confirmation of compliance to the Executive Director. On November 10, 2022, the Council distributed its Interim Order to all parties, providing the

³ 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.

⁴ The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

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."

Custodian five (5) business days to comply with the terms of said Order. Thus, the Custodian's response was due by close of business on November 18, 2022.

On November 17, 2022, the Custodian requested an extension of time until November 30, 2022 to respond to the Council's Interim Order. The GRC granted the extension on November 18, 2022. On November 30, 2022, the date of the extended deadline, the Custodian responded to the Council's Interim Order, providing nine (9) copies of the requested records for *in camera* review, along with certified confirmation of compliance to the Executive Director.

Therefore, the Custodian complied with the Council's November 9, 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.

Personnel Records/Grievance

OPRA provides that "[a] government record shall not include . . . information generated by or on behalf of public employers or public employees in connection . . . with any grievance filed by or against an individual . . ." N.J.S.A. 47:1A-1.1. 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

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 personnel record exemption may apply to records that “. . . bear many of the indicia of personnel files.” North Jersey Media Grp. v. Bergen Cnty. Prosecutor’s Office, 405 N.J. Super. 386, 390 (App. Div. 2009); Rodriguez v. Kean Univ., GRC Complaint No. 2013-296 (June 2014). In Rodriguez, 2013-296, the Council held that “the documented discipline action would ‘. . . bear many of the indicia of personnel files.’” See NJMG, 405 N.J. Super. at 390.” Id. at 5. The Council thus held that the custodian lawfully denied access to the responsive disciplinary records. The Council has also similarly 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. See Merino, GRC 2003-110, Wares v. Twp. of West Milford (Passaic), GRC Complaint No. 2014-274 (May 2015).

Privacy Interests

OPRA provides that “a public agency has a responsibility and an obligation to safeguard from public access a citizen's personal information with which it has been entrusted when disclosure thereof would violate the citizen's reasonable expectation of privacy . . .” N.J.S.A. 47:1A-1. As privacy interests are at issue here, the GRC asked both parties to respond to balancing test questions so the Council could employ the common law balancing test established by the New Jersey Supreme Court in Doe v. Poritz, 142 N.J. 1 (1995).

The Supreme Court has explained that N.J.S.A. 47:1A-1’s safeguard against disclosure of personal information is substantive and requires “a balancing test that weighs both the public’s strong interest in disclosure with the need to safeguard from public access personal information that would violate a reasonable expectation of privacy.” Burnett v. County of Bergen, 198 N.J. 408, 422-23, 427 (2009).

When “balanc[ing] OPRA’s interests in privacy and access” courts consider the following factors:

(1) the type of record requested; (2) the information it does or might contain; (3) the potential for harm in any subsequent nonconsensual disclosure; (4) the injury from disclosure to the relationship in which the record was generated; (5) the adequacy of safeguards to prevent unauthorized disclosure; (6) the degree of need for access; and (7) whether there is an express statutory mandate, articulated public policy, or other recognized public interest militating toward access.

[Id. at 427 (quoting Doe, 142 N.J. at 88).]

However, in Gettler v. Twp. of Wantage (Sussex), GRC Complaint No. 2009-73 *et seq.* (Interim Order dated June 25, 2013), in which the Council was tasked with determining whether the custodian lawfully denied access to redacted personal e-mail addresses. After determining that additional development of the record was necessary, the Council referred the complaint to the Office of Administrative Law (“OAL”). As part of this referral, the Council directed the OAL to determine whether personal e-mail addresses were disclosable both in the instance when a name is displayed or not displayed with the address.

The OAL obtained balancing test responses from the parties and conducted the test based on the Burnett factors. Based on its application of the test, the OAL determined that the factors weighed in favor of redaction of personal addresses. In reaching this conclusion, the OAL reasoned that the potential for harm in subsequent nonconsensual disclosure and the lack of any adequate safeguards preventing unauthorized disclosure of the email addresses outweighed the complainant’s degree of need for access to the email addresses. The OAL applied this reasoning to all e-mails where names accompanied the personal e-mail addresses but did require the disclosure of those e-mail addresses not accompanied by a name. The Council accepted the OAL’s Initial Decision without modification.

The GRC conducted an *in camera* examination on the submitted communications and spreadsheet. Upon review, the GRC finds that the spreadsheet was lawfully withheld from access under OPRA’s exemption for information generated in connection with a workplace complaint filed with the District. The spreadsheet contains dates and accounts of interactions with a District employee written by a fellow employee in connection with a workplace complaint. N.J.S.A. 47:1A-1.1.

Regarding the e-mail correspondence, the results of the examination are set forth in the following table:

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> Examination⁶

⁶ **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.

1.	E-mail from Micaela Bennett to Dr. J. Scott Cascone dated June 5, 2021 (part of a 2 e-mail chain).	Blank e-mail body containing attached documentation.	Information generated in connection with a workplace complaint. <u>See N.J.S.A. 47:1A-1.1.</u> Privacy interests of Ms. Bennett. <u>N.J.S.A. 47:1A-1.</u>	The personal e-mail address of Ms. Bennett was properly withheld from access under OPRA’s privacy interest exemption. <u>See N.J.S.A. 47:1A-1;</u> <u>Gettler, GRC 2009-73, et seq.</u>
2.	E-mail from Dr. J. Scott Cascone to Micaela Bennett dated June 6, 2021 (part of a 2 e-mail chain).	E-mail acknowledging receipt of the file attached to the e-mail previously received.	Information generated in connection with a workplace complaint. <u>See N.J.S.A. 47:1A-1.1.</u> Privacy interests of Ms. Bennett. <u>N.J.S.A. 47:1A-1.</u>	<p>The first sentence of the e-mail body does not include information generated in connection to a workplace harassment complaint. <u>See N.J.S.A. 47:1A-1.1</u></p> <p>Thus the Custodian must disclose this portion of the e-mail.</p> <p>The second sentence of the e-mail body does relate to information generated in connection to a workplace harassment complaint and was properly withheld. <u>See N.J.S.A. 47:1A-1.1.</u></p> <p>Further, the personal e-mail address of Ms. Bennett was properly withheld</p>

				from access under OPRA's privacy interest exemption. See <u>N.J.S.A. 47:1A-1</u> ; <u>Gettler, GRC 2009-73, et seq.</u>
3.	E-mail from Barry Geltzeiler to Dr. J. Scott Cascone dated June 8, 2021 (part of a 3 e-mail chain).	Discussion and comments pertaining to a District employee.	Information generated in connection with a workplace complaint. See <u>N.J.S.A. 47:1A-1.1</u> . Privacy interests of Mr. Geltzeiler. <u>N.J.S.A. 47:1A-1</u> .	The body of the e-mail clearly contains information generated in connection with a workplace harassment complaint and was properly withheld. See <u>N.J.S.A. 47:1A-1.1</u> . Further, the personal e-mail address of Mr. Geltzeiler was properly withheld from access under OPRA's privacy interest exemption. See <u>N.J.S.A. 47:1A-1</u> ; <u>Gettler, GRC 2009-73, et seq.</u>
4.	E-mail from Barry Geltzeiler to Dr. J. Scott Cascone dated June 8, 2021 (part of a 3 e-mail chain).	Added commentary and discussion pertaining to the District employee.	Information generated in connection with a workplace complaint. See <u>N.J.S.A. 47:1A-1.1</u> . Privacy interests of Mr. Geltzeiler. <u>N.J.S.A. 47:1A-1</u> .	The body of the e-mail clearly contains information generated in connection with a workplace harassment complaint and was properly withheld. See <u>N.J.S.A. 47:1A-1.1</u> .

				Further, the personal e-mail address of Mr. Geltzeiler was properly withheld from access under OPRA's privacy interest exemption. See <u>N.J.S.A. 47:1A-1</u> ; <u>Gettler, GRC 2009-73, et seq.</u>
5.	E-mail from Dr. J. Scott Cascone to Barry Geltzeiler to dated June 8, 2021 (part of a 3 e-mail chain).	Response to commentary and discussion of District employee.	Information generated in connection with a workplace complaint. See <u>N.J.S.A. 47:1A-1.1</u> . Privacy interests of Mr. Geltzeiler. <u>N.J.S.A. 47:1A-1</u> .	The body of the e-mail clearly contains information generated in connection with a workplace harassment complaint and was properly withheld. See <u>N.J.S.A. 47:1A-1.1</u> . Further, the personal e-mail address of Mr. Geltzeiler was properly withheld from access under OPRA's privacy interest exemption. See <u>N.J.S.A. 47:1A-1</u> ; <u>Gettler, GRC 2009-73, et seq.</u>

Thus, the Custodian unlawfully denied access to a portion of the June 6, 2021 e-mail, but lawfully denied access to the remaining e-mail bodies and Excel spreadsheet attachment under OPRA's exemption for information generated in connection with a workplace harassment complaint. Further, the Custodian lawfully denied access to the personal e-mail addresses in accordance with OPRA's privacy interest exemption.

However, and consistent with N.J.S.A. 47:1A-5(g), if the custodian of a government record asserts that part of a particular record is exempt from public access pursuant to OPRA, the custodian must delete or excise from a copy of the record that portion which the custodian asserts is exempt from access and must promptly permit access to the remainder of the record.

Thus, the Custodian must disclose all other portions of the responsive e-mails to the Complainant (*i.e.*, sender, recipients, date, time, subject, and salutations where applicable). This disclosure should take into account that portion of the June 6, 2021 e-mail which should be disclosed, as per the *In Camera* Examination table above. As to that portion of the responsive e-mail chains, the Custodian has unlawfully denied access. See Ray v. Freedom Acad. Charter Sch. (Camden), GRC Complaint No. 2009-185 (Interim Order dated August 24, 2010).

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 November 9, 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. **On the basis of the Council's determination in this matter, the Custodian shall comply with the Council's Findings of the *In Camera* Examination set forth in the above table within five (5) business days from receipt of this Order. Further, the Custodian shall simultaneously deliver⁷ certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,⁸ to the Executive Director.⁹**

⁷ 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.

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

⁹ 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.

3. The Custodian must disclose all other portions of the responsive e-mails to the Complainant (*i.e.*, sender, recipients, date, time, subject, and salutations where applicable). This disclosure should take into account that portion of the June 6, 2021 e-mail which should be disclosed, as per the *In Camera* Examination table above. As to that portion of the responsive e-mail chains, the Custodian has unlawfully denied access. See Ray v. Freedom Acad. Charter Sch. (Camden), GRC Complaint No. 2009-185 (Interim Order dated August 24, 2010).
4. **The Custodian shall comply with conclusion No. 3 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, if applicable. Further, the Custodian shall simultaneously deliver¹⁰ certified confirmation of compliance, in accordance with R. 1:4-4, to the Executive Director.**
5. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
6. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Prepared By: Samuel A. Rosado
Staff Attorney

February 21, 2023

¹⁰ 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.



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PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

INTERIM ORDER

November 9, 2022 Government Records Council Meeting

Stephen J. Christiano, Esq. (o/b/o Ronald Bligh)
Complainant

Complaint No. 2021-220

v.
West Orange Board of Education (Essex)
Custodian of Record

At the November 9, 2022 public meeting, the Government Records Council (“Council”) considered the October 27, 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 the withheld records responsive to the Complainant’s OPRA request to determine the validity of the Custodian’s assertion that the denial of access was valid under the personnel records exemption, workplace harassment exemptions, or the privacy interests exemption. See N.J.S.A. 47:1A-10; N.J.S.A. 47:1A.1-1; N.J.S.A. 47:1A-1; Paff v. N.J. Dep’t of Labor, Bd. of Review, 379 N.J. Super. 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), 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.
4. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian’s compliance with the Council’s Interim Order.

¹ The *in camera* records may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as 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."

Interim Order Rendered by the
Government Records Council
On The 9th Day of November 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: November 10, 2022

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
November 9, 2022 Council Meeting**

**Stephen J. Christiano, Esq.
(on Behalf of Ronald Bligh)¹
Complainant**

GRC Complaint No. 2021-220

v.

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

Records Relevant to Complaint: Electronic copies via e-mail of: “All e-mails from January 1, 2021 to the present by and between Trish Delloso and Micaela Bennett, Ben Avery, and Barry Geltzeiler relative to Ronald Bligh and all e-mails from the same time period by and between Dr. Scott Cascone and Micaela Bennett, Ben Avery and Barry Geltzeiler regarding Ronald Bligh.”

Custodian of Record: Tonya Flowers
Request Received by Custodian: June 28, 2021
Response Made by Custodian: August 4, 2021
GRC Complaint Received: September 20, 2021

Background³

Request and Response:

On June 28, 2021, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On July 6, 2021, the Custodian responded in writing stating that an extension until August 5, 2021 was needed to compile, review and produce potentially responsive records.

On August 4, 2021, the Custodian responded in writing stating that the West Orange Public School District (“District”) located five (5) e-mails and a spreadsheet as potentially responsive to the OPRA request. The Custodian stated that each record was shielded from public access as they contained information generated by the District in connection with a workplace harassment complaint filed by the District. See N.J.S.A. 47:1A-1.1. Further, the Custodian stated that the spreadsheet was a personnel record for Ms. Delloso under N.J.S.A. 47:1A-10.

¹ The Complainant represents Ronald Bligh.

² Represented by Bradley D. Tishman, Esq., of Cleary, Giacobbe, Alfieri, Jacobs, LLC (Oakland, NJ).

³ The parties may have submitted additional correspondence or made additional statements/assertions in the submissions identified herein. However, the Council includes in the Findings and Recommendations of the Executive Director the submissions necessary and relevant for the adjudication of this complaint.

Stephen J. Christiano, Esq. (on Behalf of Ronald Bligh) v. West Orange Board of Education (Essex), 2021-220 – Findings and Recommendations of the Executive Director

On August 5, 2021, the Complainant responded to the Custodian via e-mail, stating that the identified individuals should not have direct knowledge of any allegations of “workplace harassment” involving his client. The Complainant further stated that OPRA does not identify “workplace harassment” as a valid exemption but instead recognizes information relating to “any sexual harassment complaint filed with a public employer.” N.J.S.A. 47:1A-1.1. The Complainant stated that unless the District alleged that his client sexually harassed an employee, there was no basis to deny access to the records. The Complainant next stated that the spreadsheet did not constitute a personnel record under OPRA since it was created by Ms. Dellosso for their own use, and then later distributed to an outside party.

On August 10, 2021, the Custodian’s Counsel responded to the Complainant via e-mail, stating that the spreadsheet was “kept on file” in the course of District business, and that the personnel records exemption was not limited to items included within a personnel file. McGee v. Twp. of East Amwell, 416 N.J. Super. 602, 616 (App. Div. 2010). Counsel further stated that records involving employee discipline or investigations into employee misconduct constituted personnel records. Libertarians for Transparent Gov’t v. Cumberland Cnty., 465 N.J. Super. 11, 20 (App. Div. 2020). Counsel stated that the investigation at issue involved potential employee misconduct and therefore the spreadsheet was a personnel record not subject to disclosure under OPRA.

Counsel next stated that the District interpreted OPRA’s harassment complaint exemption to include all forms of harassment, not just those of a sexual nature. Counsel stated that it would be “unfathomable” to preclude access for sexual harassment complaints but permit disclosure of all other forms of harassment complaints. Counsel stated that the District acted in good faith in relying on N.J.S.A. 47:1A-1.1 to preclude access to the records.

Lastly, Counsel stated that allowing access to e-mails transmitted between the District’s Superintendent and citizens regarding the subject matter would violate the citizens’ reasonable expectation of privacy. N.J.S.A. 47:1A-1. Gannett New Jersey Partners, L.P. v. Cnty. of Middlesex, 379 N.J. Super. 205, 217 (App. Div. 2005).

Denial of Access Complaint:

On September 20, 2021, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant included correspondence received from the Custodian, and relied on his August 5, 2021 reply in arguing against denial.

Statement of Information:

On October 29, 2021, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on June 28, 2021. The Custodian certified that her search included conducting a search of the District’s e-mail server, and Dr. Cascone conducting a search of his own e-mails for responsive records. The Custodian certified that she responded in writing on August 4, 2021, denying access to the e-mails.

The Custodian asserted that Ms. Dellosso was a District employee who lodged harassment allegations against Mr. Bligh. The Custodian asserted that Ms. Dellosso prepared a spreadsheet that detailed her interactions with Mr. Bligh and was thereafter received by the District. The Custodian maintained her position that she lawfully denied access to the spreadsheet and e-mails as stated in her responses dated August 4, 2021 and August 10, 2021.

Additional Submissions:

On November 1, 2021, the Complainant e-mailed the GRC in response to the SOI. The Complainant specified Ms. Dellosso's job title with the District and noted that Mr. Bligh has not been disciplined by the District. The Complainant contended that there was an investigation conducted by the District, but that there was no evidence to assert that the located records could be characterized as pertaining to employee discipline.

The Complainant also argued that if the spreadsheet was a record of actions and performance of Mr. Bligh, then it would be his personnel record and not Ms. Dellosso's. The Complainant also argued that even if the spreadsheet was Ms. Dellosso's personnel record, she waived confidentiality when she shared it with Ms. Bennett, a private citizen.

The Complainant last argued that McGee concerned e-mails circulated amongst public employees, whereas in the instant matter, private citizens were involved in the responsive e-mails. The Complainant argued that their involvement was odd considering they would not have public knowledge of the alleged conduct.

Analysis

Unlawful Denial of Access

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

In Paff v. N.J. Dep't of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005), the complainant appealed a final decision of the Council⁴ 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

⁴ Paff v. NJ Dep't of Labor, Bd. of Review, GRC Complaint No. 2003-128 (October 2005).
Stephen J. Christiano, Esq. (on Behalf of Ronald Bligh) v. West Orange Board of Education (Essex), 2021-220 – Findings and Recommendations of the Executive Director

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 for concern about unauthorized disclosure of exempt documents or privileged information as a result of *in camera* review by the GRC. The GRC’s obligation to maintain confidentiality and avoid disclosure of exempt material is implicit in N.J.S.A. 47:1A-7(f), which provides for closed meeting when necessary to avoid disclosure before resolution of a contested claim of exemption.

[Id.]

In the instant matter, the Custodian asserted that the spreadsheet located in response to the Complainant’s OPRA request was withheld as personnel record under N.J.S.A. 47:1A-10. The Custodian further asserted that the e-mails located in response to the request were withheld as they contained information relating to a workplace harassment violation under N.J.S.A. 47:1A-1.1, and to protect the privacy interests of the citizens involved under N.J.S.A. 47:1A-1.

The Complainant asserted that the spreadsheet did not fit the definition of a personnel record, but even if it did, the employee waived confidentiality by sharing the spreadsheet to private citizens. The Complainant also asserted that no evidence has been shown to demonstrate that the e-mails contained information relating to workplace harassment.

Notwithstanding the Custodian’s description of the responsive records, a “meaningful review” is necessary to determine whether the records fell under the asserted exemptions. The GRC must thus review same in order to determine the full applicability of the exemptions, which is not without precedent in similar circumstances. See Kupferman v. Long Hill Twp. Bd. of Educ. (Morris), GRC Complaint No. 2007-213 (Interim Order dated November 4, 2009).

Therefore, the GRC must conduct an *in camera* review of the withheld records responsive to the Complainant’s OPRA request to determine the validity of the Custodian’s assertion that the denial of access was valid under the personnel records exemption, workplace harassment exemptions, or the privacy interests exemption. See N.J.S.A. 47:1A-10; N.J.S.A. 47:1A.1-1; N.J.S.A. 47:1A-1; Paff, 379 N.J. Super. at 346.

Knowing & Willful

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

Prevailing Party Attorney's Fees

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

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The GRC must conduct an *in camera* review of the withheld records responsive to the Complainant's OPRA request to determine the validity of the Custodian's assertion that the denial of access was valid under the personnel records exemption, workplace harassment exemptions, or the privacy interests exemption. See N.J.S.A. 47:1A-10; N.J.S.A. 47:1A.1-1; N.J.S.A. 47:1A-1; Paff v. N.J. Dep't of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005).
2. **The Custodian shall deliver⁵ to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see conclusion No. 1 above), a document or redaction index⁶, as well as a legal certification from the Custodian, in accordance with N.J. Court Rules, R. 1:4-4,⁷ that the 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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⁵ The *in camera* records may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives them by the deadline.

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

⁷ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

Stephen J. Christiano, Esq. (on Behalf of Ronald Bligh) v. West Orange Board of Education (Essex), 2021-220 – Findings and Recommendations of the Executive Director