



State of New Jersey  
GOVERNMENT RECORDS COUNCIL  
101 SOUTH BROAD STREET  
PO BOX 819  
TRENTON, NJ 08625-0819

JON S. CORZINE  
Governor

CHARLES A. RICHMAN  
Acting Commissioner

FINAL DECISION

November 4, 2009 Government Records Council Meeting

Chris Rogers  
Complainant

Complaint No. 2008-228

v.

Roxbury Board of Education (Morris)  
Custodian of Record

At the November 4, 2009 public meeting, the Government Records Council (“Council”) considered the October 21, 2009 *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, finds that:

1. The Custodian has complied with the Council’s April 29, 2009 Interim Order by providing the Council with all records set forth in Paragraph 2 of the Order, as well as a document or redaction index, and a legal certification within the extended time to comply with said Order.
2. **The *In Camera* Examination set forth in the above table reveals the Custodian has lawfully denied access to the records listed in the document index because said record is exempt from disclosure under N.J.S.A. 47:1A-1.1 as advisory, consultative, or deliberative material.**
3. The Custodian lawfully denied access to the requested report because the report is exempt from disclosure in its entirety as advisory, consultative or deliberative material pursuant to N.J.S.A. 47:1A-1.1. since the deliberative process privilege is a doctrine that permits government agencies to withhold documents that reflect advisory opinions, recommendations and deliberations submitted as part of a process by which governmental decisions and policies are formulated. NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 150, 95 S. Ct. 1504, 1516, 44 L. Ed. 2d 29, 47 (1975).
4. Because the results of the *in camera* review determine that the Custodian lawfully denied access to the requested report since it is exempt from disclosure as advisory, consultative or deliberative material pursuant to N.J.S.A. 47:1A-1.1 under OPRA, the Custodian did not knowingly and



willfully violate OPRA and unreasonably deny access under the totality of the circumstances.

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 4<sup>th</sup> Day of November, 2009

Robin Berg Tabakin, Chair  
Government Records Council

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

Janice L. Kovach, Secretary  
Government Records Council

**Decision Distribution Date: November 9, 2009**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

***In Camera* Findings and Recommendations of the Executive Director  
November 4, 2009 Council Meeting**

**Chris Rogers<sup>1</sup>  
Complainant**

**GRC Complaint No. 2008-228**

v.

**Roxbury Board of Education (Morris)<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:** Copy of a buildings and grounds report.

**Request Made:** September 23, 2008

**Response Made:** October 1, 2008

**Custodian:** Ruth Anne Quinn

**GRC Complaint Filed:** October 10, 2008<sup>3</sup>

**Records Submitted for *In Camera* Examination:** The “Assessment of the Custodial, Maintenance and Grounds Functions” prepared by Edvocate School Support Solutions.

**Background**

**April 29, 2009**

Government Records Council’s Interim Order. At the April 29, 2009 public meeting, the Government Records Council (“Council”) considered the April 22, 2009 Executive Director’s Findings and Recommendations 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. Pursuant to Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005), the GRC must conduct an *in camera* review of the “Assessment of the Custodial, Maintenance and Grounds Functions,” produced by Edvocate Solutions to determine the validity of the Custodian’s assertion that the record constitutes information that would hinder the Board’s position in collective negotiations or advisory, consultative, or deliberative material which is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1. *See also* Haemmerle v. Washington Township (Mercer), GRC Complaint No. 2006-106 (June 2007).

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

<sup>2</sup> Represented by Marc H. Zitomer, Esq., of Schwartz, Simon, Edelstein, Celso & Kessler, LLC (Morristown, NJ).

<sup>3</sup> The GRC received the Denial of Access Complaint on said date.

2. **The Custodian must deliver<sup>4</sup> to the Council in a sealed envelope nine (9) copies of the requested unredacted document (see No. 1 above), a document or redaction index<sup>5</sup>, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4<sup>6</sup>, that the document provided is the document 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.

**May 1, 2009**

Council's Interim Order ("Order") distributed to the parties.

**May 6, 2009**

E-mail from the Custodian's Counsel to the GRC. Counsel requests a five (5) business day extension of time to comply with the Council's April 29, 2009 Interim Order.

**May 6, 2009**

E-mail from the GRC to Custodian's Counsel. The GRC grants Counsel a five (5) business day extension of time to comply with the Council's April 29, 2009 Interim Order (thus making the new compliance date May 15, 2009).

**May 14, 2009**

Certification of the Custodian in response to the Council's Interim Order with the unredacted copy of the requested record attached. The Custodian certifies that he is Board Secretary and Business Administrator, as well as the Custodian. The Custodian further certifies that the requested record was statutorily exempt from disclosure under OPRA as "... 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..." pursuant to N.J.S.A. 47:1A-1.1. However, the Custodian certifies that now that the Complainant is a member of the Board of Education, the Complainant is entitled to the requested record.

**Analysis**

**Whether the Custodian complied with the Council's April 29, 2009 Interim Order?**

At its April 29, 2009 public meeting, the Council determined that because the Custodian has asserted that the requested record was lawfully denied pursuant to N.J.S.A.

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<sup>4</sup> The *in camera* documents may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as they arrive at the GRC office by the deadline.

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

<sup>6</sup> "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."

47:1A-1.1 as “... 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...”, the Council must determine whether the legal conclusion asserted by the Custodian is properly applied to the record at issue pursuant to Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005). Therefore, the GRC must conduct an *in camera* review of the requested record to determine the validity of the Custodian’s assertion that the requested record was properly denied.

The Council therefore ordered the Custodian to deliver to the Council in a sealed envelope nine (9) copies of the requested unredacted document, a document or redaction index, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4, that the document provided is the document requested by the Council for the *in camera* inspection. Such delivery was to be received by the GRC within five (5) business days from receipt of the Council’s Interim Order or on May 8, 2009.

On May 6, 2009, Custodian’s Counsel requested and was granted a five (5) business day extension of time to comply with the Council’s April 29, 2009 Interim Order. Thereafter, the Custodian provided the GRC with a legal certification, the unredacted record requested for the *in camera* inspection, and a document index on May 14, 2009 (within the extended time to comply with the Interim Order).

Therefore, the Custodian complied with the Council’s April 29, 2009 Interim Order within the extended time to comply with said Order.

**Whether the Custodian unlawfully denied the Complainant access to the “Assessment of the Custodial, Maintenance and Grounds Functions” prepared by Edvocate School Support Solutions?**

The Custodian asserts in the Statement of Information and the certification submitted in compliance with the Council’s April 29, 2009 Interim Order that he lawfully denied the Complainant access to the requested record because said record is exempt from disclosure under OPRA as “... 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...” Additionally, the Custodian asserts in the Statement of Information that the requested record is exempt from disclosure as advisory, consultative or deliberative material pursuant to N.J.S.A. 47:1A-1.1. because the report contains professional opinions and recommendations that are both pre-decisional and deliberative in nature similar to the circumstance in Haemmerle v. Washington Township (Mercer), GRC Complaint No. 2006-106 (June 2007). Conversely, the Complainant asserts that he was unlawfully denied access to the requested report.

The requested report states in the introduction that “[t]he purpose of this assessment is to provide the Roxbury Township School District with an evaluation of its custodial, maintenance, grounds and management functions. The goal was a thorough baseline assessment of the department’s current status and recommendations for improvement...”

OPRA excludes from the definition of a government record “inter-agency or intra-agency advisory, consultative or deliberative material.” N.J.S.A. 47:1A-1.1. It is evident

that this phrase is intended to exclude from the definition of a government record the types of documents that are the subject of the “deliberative process privilege.”

In O’Shea v. West Milford Board of Education, GRC Complaint No. 2004-93 (April 2006), the Council stated that “neither the statute nor the courts have defined the terms... ‘advisory, consultative, or deliberative’ in the context of the public records law. The Council looks to an analogous concept, the deliberative process privilege, for guidance in the implementation of OPRA’s ACD exemption. Both the ACD exemption and the deliberative process privilege enable a governmental entity to shield from disclosure material that is pre-decisional and deliberative in nature. Deliberative material contains opinions, recommendations, or advice about agency policies. In Re the Liquidation of Integrity Insurance Company, 165 N.J. 75, 88 (2000); In re Readoption With Amendments of Death Penalty Regulations, 182 N.J.149 (App. Div. 2004).

The deliberative process privilege is a doctrine that permits government agencies to withhold documents that reflect advisory opinions, recommendations and deliberations submitted as part of a process by which governmental decisions and policies are formulated. NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 150, 95 S. Ct. 1504, 1516, 44 L. Ed. 2d 29, 47 (1975). Specifically, the New Jersey Supreme Court has ruled that a record that contains or involves factual components is entitled to deliberative-process protection under the exemption in OPRA when it was used in decision-making process *and* its disclosure would reveal deliberations that occurred during that process. Education Law Center v. NJ Department of Education, 198 N.J. 274, 966 A.2d 1054, 1069 (2009). This long-recognized privilege is rooted in the concept that the sovereign has an interest in protecting the integrity of its deliberations. The earliest federal case adopting the privilege is Kaiser Alum. & Chem. Corp. v. United States, 157 F. Supp. 939 (1958). The privilege and its rationale were subsequently adopted by the federal district courts and circuit courts of appeal. United States v. Farley, 11 F.3d 1385, 1389 (7th Cir.1993).

The deliberative process privilege was discussed at length in In Re Liquidation of Integrity Insurance Co., 165 N.J. 75 (2000). There, the court addressed the question of whether the Commissioner of Insurance, acting in the capacity of Liquidator of a regulated entity, could protect certain records from disclosure which she claimed contained opinions, recommendations or advice regarding agency policy. *Id.* at 81. The court adopted a qualified deliberative process privilege based upon the holding of McClain v. College Hospital, 99 N.J. 346 (1985), Liquidation of Integrity, *supra*, 165 N.J. at 88. In doing so, the court noted that:

“[a] document must meet two requirements for the deliberative process privilege to apply. First, it must have been generated before the adoption of an agency's policy or decision. In other words, it must be pre-decisional. ... Second, the document must be deliberative in nature, containing opinions, recommendations, or advice about agency policies. ... Purely factual material that does not reflect deliberative processes is not protected. ... Once the government demonstrates that the subject materials meet those threshold requirements, the privilege comes into play. In such circumstances, the government's interest in candor is the "preponderating policy" and, prior to

considering specific questions of application, the balance is said to have been struck in favor of non-disclosure.” (Citations omitted.) *Id.* at 84-85.

The court further set out procedural guidelines based upon those discussed in McClain:

“[t]he initial burden falls on the state agency to show that the documents it seeks to shield are pre-decisional and deliberative in nature (containing opinions, recommendations, or advice about agency policies). Once the deliberative nature of the documents is established, there is a presumption against disclosure. The burden then falls on the party seeking discovery to show that his or her compelling or substantial need for the materials overrides the government's interest in non-disclosure. Among the considerations are the importance of the evidence to the movant, its availability from other sources, and the effect of disclosure on frank and independent discussion of contemplated government policies.” In Re Liquidation of Integrity, *supra*, 165 N.J. at 88, citing McClain, *supra*, 99 N.J. at 361-62, 492 A.2d 991.

In In Re Liquidation of Integrity, *supra*, 165 N.J. at 84-5, the judiciary set forth the legal standard for applying the deliberative process privilege as follows:

- (1) The initial burden falls on the government agency to establish that matters are both *pre-decisional* and *deliberative*.
  - a. Pre-decisional means that the records were generated before an agency adopted or reached its decision or policy.
  - b. Deliberative means that the record contains opinions, recommendations, or advice about agency policies or decisions.
    - i. Deliberative materials do not include purely factual materials.
    - ii. Where factual information is contained in a record that is deliberative, such information must be produced so long as the factual material can be separated from its deliberative context.
  - c. The exemption covers recommendations, draft documents, proposals, suggestions, and other subjective documents *which reflect the personal opinions of the writer rather than the policy of the agency*.
  - d. Documents which are protected by the privilege are those which *would inaccurately reflect or prematurely disclose the views of the agency, suggesting as agency position that which is only a personal position*.
  - e. To test whether disclosure of a document is likely to adversely affect the purposes of the privilege, courts ask themselves *whether the document is*

*so candid or personal in nature that public disclosure is likely in the future to stifle honest and frank communications within the agency.*

The GRC conducted an *in camera* examination on the submitted record. The results of this examination are set forth in the following table:

<b>Record or Redaction Number</b>	<b>Record Name/Date</b>	<b>Description of Record or Redaction</b>	<b>Custodian’s Explanation/ Citation for Non-disclosure or Redactions</b>	<b>Findings of the <i>In Camera</i> Examination<sup>7</sup></b>
1	“Assessment of the Custodial, Maintenance and Grounds Functions” prepared by Edvocate School Support Solutions	The report provides an assessment of the department’s current operations and recommendations for improvements.	The record is exempt from disclosure under OPRA as “... 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...” and as advisory, consultative or deliberative material	The report is exempt from disclosure in its entirety as advisory, consultative or deliberative material pursuant to <u>N.J.S.A. 47:1A-1.1</u> . because the deliberative process privilege is a doctrine that permits government agencies to withhold documents that reflect advisory opinions, recommendations and deliberations submitted as part of a process by

<sup>7</sup> **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.

			<p>pursuant to <u>N.J.S.A.</u> 47:1A-1.1</p>	<p>which governmental decisions and policies are formulated. <u>NLRB v. Sears, Roebuck &amp; Co.</u>, 421 <u>U.S.</u> 132, 150, 95 <u>S. Ct.</u> 1504, 1516, 44 <u>L. Ed.</u> 2d 29, 47 (1975).</p> <p>The GRC finds no need to address the exemption for “... 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 ...” pursuant to <u>N.J.S.A.</u> 47:1A-1.1.</p>
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Thus, the Custodian lawfully denied access to the requested report because the report is exempt from disclosure in its entirety as advisory, consultative or deliberative material pursuant to N.J.S.A. 47:1A-1.1. since the deliberative process privilege is a doctrine that permits government agencies to withhold documents that reflect advisory opinions, recommendations and deliberations submitted as part of a process by which governmental decisions and policies are formulated. NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 150, 95 S. Ct. 1504, 1516, 44 L. Ed. 2d 29, 47 (1975).

**Whether the Custodian’s denial of access to the requested records rises to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances?**

OPRA states that:

“[a] public official, officer, employee or custodian who knowingly or willfully violates [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, shall be subject to a civil penalty ...” N.J.S.A. 47:1A-11.a.

OPRA allows the Council to determine a knowing and willful violation of the law and unreasonable denial of access under the totality of the circumstances. Specifically OPRA states:

“... If 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 (Berg); 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).

Because the results of the *in camera* review determine that the Custodian lawfully denied access to the requested report since it is exempt from disclosure as advisory, consultative or deliberative material pursuant to N.J.S.A. 47:1A-1.1 under OPRA, the Custodian did not knowingly and willfully violate OPRA and unreasonably deny access under the totality of the circumstances.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. The Custodian has complied with the Council’s April 29, 2009 Interim Order by providing the Council with all records set forth in Paragraph 2 of the Order, as well as a document or redaction index, and a legal certification within the extended time to comply with said Order.
2. **The *In Camera* Examination set forth in the above table reveals the Custodian has lawfully denied access to the records listed in the document index because said record is exempt from disclosure under N.J.S.A. 47:1A-1.1 as advisory, consultative, or deliberative material.**

3. The Custodian lawfully denied access to the requested report because the report is exempt from disclosure in its entirety as advisory, consultative or deliberative material pursuant to N.J.S.A. 47:1A-1.1. since the deliberative process privilege is a doctrine that permits government agencies to withhold documents that reflect advisory opinions, recommendations and deliberations submitted as part of a process by which governmental decisions and policies are formulated. NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 150, 95 S. Ct. 1504, 1516, 44 L. Ed. 2d 29, 47 (1975).
4. Because the results of the *in camera* review determine that the Custodian lawfully denied access to the requested report since it is exempt from disclosure as advisory, consultative or deliberative material pursuant to N.J.S.A. 47:1A-1.1 under OPRA, the Custodian did not knowingly and willfully violate OPRA and unreasonably deny access under the totality of the circumstances.

Prepared and  
Approved By: Catherine Starghill, Esq.  
Executive Director

October 21, 2009



State of New Jersey  
GOVERNMENT RECORDS COUNCIL  
101 SOUTH BROAD STREET  
PO BOX 819  
TRENTON, NJ 08625-0819

JON S. CORZINE  
Governor

JOSEPH V. DORIA, JR.  
Commissioner

INTERIM ORDER

April 29, 2009 Government Records Council Meeting

Chris Rogers  
Complainant

Complaint No.2008-228

v.

Roxbury Board of Education (Morris)  
Custodian of Record

At the April 29, 2009 public meeting, the Government Records Council ("Council") considered the April 22, 2009 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. Pursuant to Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005), the GRC must conduct an *in camera* review of the "Assessment of the Custodial, Maintenance and Grounds Functions," produced by Edvocate Solutions to determine the validity of the Custodian's assertion that the record constitutes information that would hinder the Board's position in collective negotiations or advisory, consultative, or deliberative material which is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1. *See also Haemmerle v. Washington Township (Mercer)*, GRC Complaint No. 2006-106 (June 2007).
2. **The Custodian must deliver<sup>1</sup> to the Council in a sealed envelope nine (9) copies of the requested unredacted document (see No. 1 above), a document or redaction index<sup>2</sup>, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4<sup>3</sup>, that the document provided is the document requested by the Council for the *in camera***

<sup>1</sup> The *in camera* documents may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as they arrive at the GRC office by the deadline.

<sup>2</sup> The document or redaction index should identify the document and/or each redaction asserted and the lawful basis for the denial.

<sup>3</sup> "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."



**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.

Interim Order Rendered by the  
Government Records Council  
On The 29<sup>th</sup> Day of April, 2009

Robin Berg Tabakin, Chairwoman  
Government Records Council

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

Janice L. Kovach  
Government Records Council

**Decision Distribution Date: May 1, 2009**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
April 29, 2009 Council Meeting**

**Chris Rogers<sup>1</sup>  
Complainant**

**GRC Complaint No. 2008-228**

**v.**

**Roxbury Board of Education (Morris)<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:** Copy of a buildings and grounds report.

**Request Made:** September 23, 2008

**Response Made:** October 1, 2008

**Custodian:** Ruth Anne Quinn

**GRC Complaint Filed:** October 10, 2008<sup>3</sup>

**Background**

**September 23, 2008**

Complainant's Open Public Records Act ("OPRA") request. The Complainant requests the record relevant to this complaint listed above in an e-mail stating that it is an official OPRA request.<sup>4</sup>

**September 29, 2008**

E-mail from the Complainant to the Custodian. The Complainant requests that the Custodian confirm whether the requested report is ready for pickup in printed form.

**October 1, 2008**

Custodian's response to the OPRA request. The Custodian responds in writing to the Complainant's OPRA request on the sixth (6<sup>th</sup>) business day following receipt of such request. The Custodian states that access to the requested report is denied because the report is being used as a negotiation tool.

**October 10, 2008**

Denial of Access Complaint filed with the Government Records Council ("GRC") with the following attachments:

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

<sup>2</sup> Represented by Marc H. Zitomer, Esq., of Schwartz, Simon, Edelstein, Celso & Kessler, LLC (Morristown, NJ).

<sup>3</sup> The GRC received the Denial of Access Complaint on said date.

<sup>4</sup> The Complainant did not attach an official OPRA request form to his September 23, 2008 e-mail. The Custodian forwarded a copy of the e-mail attached to an official OPRA request via facsimile on September 24, 2008.

- Complainant’s OPRA request dated September 23, 2008.<sup>5</sup>
- E-mail from the Complainant to the Custodian dated September 29, 2008.
- E-mail from the Custodian to the Complainant dated October 1, 2008.

The Complainant states that he e-mailed the Custodian on September 23, 2008 and requested a copy of the most recent buildings and grounds report that was mentioned at a Board meeting at the end of last year.<sup>6</sup> The Complainant states that the Custodian responded via e-mail on October 1, 2008 denying access to the requested report and citing that the report was being used as a negotiation tool.

**November 14, 2008**

Offer of Mediation sent to both parties.

**November 16, 2008**

The Complainant declines mediation. The Custodian also did not agree to mediate this complaint.

**November 18, 2008**

Request for the Statement of Information sent to the Custodian.

**November 20, 2008**

Letter from the Custodian’s Counsel to the GRC. Counsel requests a seven (7) day extension until December 1, 2008 to submit the Statement of Information.

**November 21, 2008**

E-mail from the GRC to the Custodian’s Counsel. The GRC states that, if needed, it usually grants a five (5) business day extension of time to respond to a request for a Statement of Information. Therefore, the GRC grants an extension until December 3, 2008 to submit the Statement of Information.

**December 3, 2008**

Custodian’s Statement of Information (“SOI”) with the following attachments:

- Complainant’s Denial of Access Complaint.
- E-mail from the Custodian to the Complainant dated October 1, 2008.

The Custodian states that she responded to the Complainant’s September 23, 2008 OPRA request on October 1, 2008 denying access to the requested record because it is being used as a negotiation tool.

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<sup>5</sup> The Complainant also attaches several e-mails which are irrelevant to the adjudication of this complaint and an official OPRA request form dated October 2, 2008 for the same record relevant to this complaint. It is not clear why the Complainant chose to include the October 2, 2008 OPRA request in the instant complaint; however, the Complainant filed this Denial of Access Complaint prior to the expiration of the Custodian’s statutorily mandated seven (7) business day time frame to respond.

<sup>6</sup> It is unclear whether the Complainant means the end of the last calendar year or the end of the last school year.

The Custodian avers that the requested report, which was produced by Advocate Solutions and titled “Assessment of the Custodial, Maintenance and Grounds Functions,” was commissioned by the Board to help assist the Board in investigating the District’s custodial productivity and efficiency in anticipation of collective bargaining negotiations with the Union. The Custodian argues that since the report is currently being utilized in conjunction with the ongoing collective negotiations between the Board and custodial/maintenance unit, the Custodian’s denial of access was authorized by law.

The Custodian states that pursuant to N.J.S.A. 47:1A-1.1., government records do not include:

“...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.”

The Custodian avers that because the report details and analyzes the current Board practices with respect to custodial/maintenance employees and offers various options and recommendations to strengthen managerial control, productivity and cost savings, disclosure of the requested report could potentially compromise the Board’s negotiation position.

Additionally, the Custodian contends that the requested report is exempt from disclosure because it contains recommendations that are both pre-decisional and deliberative in nature. The Custodian asserts that the requested report contains professional opinions, recommendations and advice that are not formal Board policy or procedure and cites to Haemmerle v. Washington Township (Mercer), GRC Complaint No. 2006-106 (June 2007).

The Custodian contends that, based on the aforementioned reasons, the GRC should dismiss this complaint in its entirety and find that the Custodian lawfully denied access to the requested report.

### Analysis

#### **Whether the Custodian unlawfully denied access to the requested buildings and grounds report?**

OPRA provides that:

“...government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, *with certain exceptions...*” (Emphasis added.) N.J.S.A. 47:1A-1.

Additionally, OPRA defines a government record as:

“... any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document,

information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof, that has been *made, maintained or kept on file ... or that has been received* in the course of his or its official business ...[t]he terms shall not include *inter-agency or intra-agency advisory, consultative, or deliberative material*” (Emphasis added.) N.J.S.A. 47:1A-1.1.

Further, OPRA states that:

“[a] government record *shall not include* the following information which is deemed to be *confidential...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.*” (Emphasis added.) N.J.S.A. 47:1A-1.1.

OPRA places the onus on the Custodian to prove that a denial of access is lawful. Specifically, OPRA states:

“...[t]he public agency shall have the burden of proving that the denial of access is authorized by law...” N.J.S.A. 47:1A-6.

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

The Custodian’s denial of access to the requested building and grounds report is based on two exemptions. First, the Custodian contends that the Board commissioned the report in anticipation of collective bargaining negotiations with the Union. The Custodian further argues that the report is now being used as part of these negotiations.

Second, the Custodian argues that the report is considered advisory, consultative or deliberative (“ACD”) material because it contains professional opinions, recommendations and advice that are not formal Board policy or procedure. The Custodian argues that her denial of the requested report is consistent with the GRC’s holding in Haemmerle v. Washington Township (Mercer), GRC Complaint No. 2006-106 (June 2007), that the Custodian properly denied access to records as ACD material.

However, in Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005), the Complainant appealed a final decision of the GRC<sup>7</sup> in which the GRC dismissed the complaint by accepting the Custodian’s legal conclusion for the denial of access without further review. The court stated that:

“OPRA contemplates the GRC’s meaningful review of the basis for an agency’s decision to withhold government records...When the GRC

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<sup>7</sup> Paff v. NJ Department of Labor, Board of Review, GRC Complaint No. 2003-128 (October 2005).  
Chris Rogers v. Roxbury Board of Education (Morris), 2008-228 – Findings and Recommendations of the Executive Director

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.”

The court also stated that:

“[t]he statute 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-7f. This provision would be unnecessary if the Legislature did not intend to permit *in camera* review.”

Further, the court stated that:

“[w]e 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-7f, which provides for closed meeting when necessary to avoid disclosure before resolution of a contested claim of exemption.”

Additionally, the records requested in Haemmerle, *supra* were e-mails sent between government officials which contained a draft letter that the Custodian certified was never finalized or sent to the residents of Washington Township. Ultimately, the GRC ordered an *in-camera* review to determine whether the e-mails were ACD material.

Therefore, pursuant to Paff, *supra*, the GRC must conduct an *in camera* review of the “Assessment of the Custodial, Maintenance and Grounds Functions,” produced by Edvocate Solutions to determine the validity of the Custodian’s assertion that the record constitutes information that would hinder the Board’s position in collective negotiations or ACD material which is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1. *See also Haemmerle*, *supra*.

**Whether the Custodian’s delay in access to the requested records rises to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances?**

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.

## Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Pursuant to Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005), the GRC must conduct an *in camera* review of the “Assessment of the Custodial, Maintenance and Grounds Functions,” produced by Edvocate Solutions to determine the validity of the Custodian’s assertion that the record constitutes information that would hinder the Board’s position in collective negotiations or advisory, consultative, or deliberative material which is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1. See also Haemmerle v. Washington Township (Mercer), GRC Complaint No. 2006-106 (June 2007).
  
2. **The Custodian must deliver<sup>8</sup> to the Council in a sealed envelope nine (9) copies of the requested unredacted document (see No. 1 above), a document or redaction index<sup>9</sup>, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4<sup>10</sup>, that the document provided is the document 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.

Prepared By: Frank F. Caruso  
Case Manager

Approved By: Catherine Starghill, Esq.  
Executive Director

April 22, 2009

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<sup>8</sup> The *in camera* documents may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as they arrive at the GRC office by the deadline.

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

<sup>10</sup> "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."