



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

December 22, 2009 Government Records Council Meeting

Anonymous
Complainant

Complaint No. 2008-257

v.

Franklin Township Fire District No. 1
Custodian of Record

At the December 22, 2009 public meeting, the Government Records Council (“Council”) considered the September 23, 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. Although the Custodian provided the GRC with the requested records and the Custodian’s certification in compliance with the Council’s September 30, 2009 Interim Order on October 12, 2009, in a timely manner, the Custodian did not include a document or redaction index at that time. The Custodian did, however, submit such redaction index on November 12, 2009. Therefore, the Custodian did not timely comply with the Council’s September 30, 2009 Interim Order.
2. The *In Camera* Examination set forth in the table below reveals the Custodian has lawfully denied access to the requested record as personnel material pursuant to N.J.S.A. 47:1A-10. As such, the Custodian has borne his burden of proving a lawful denial of access pursuant to N.J.S.A. 47:1A-6.
3. Although the Custodian failed to comply with the Council’s September 30, 2009 Interim Order within five (5) business days of receipt of the Order by failing to provide a redaction index, the Custodian did ultimately comply with the Council’s September 30, 2009 Interim Order on November 12, 2009. Moreover, the results of the *in camera* review determine that the Custodian lawfully denied access to the requested records since the redacted portions are exempt from disclosure pursuant to the personnel exemption of OPRA at N.J.S.A. 47:1A-10. Therefore, it is concluded that the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.



4. Because the evidence of record indicates that the Custodian disclosed records to the Complainant on July 25, 2008 and on October 10, 2008 disclosed unredacted copies of Resolution 08-21 and meeting minutes dated December 10, 2007 as well as redacted copies of Executive Session meeting minutes dated January 28, 2008, May 19, 2008 and June 23, 2008, and because the Denial of Access Complaint in this matter was filed on November 12, 2008, and because the results of the *in camera* review have determined that the Custodian lawfully denied access to the requested records since the redacted portions are exempt from disclosure pursuant to the personnel exemption of OPRA at N.J.S.A. 47:1A-10, the Complainant is not a prevailing party entitled to an award of prevailing party attorney fees.

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> Examination¹
Meeting minutes dated 1/28/2008, 5 pages	Meeting minutes dated 1/28/2008	Page 2, third paragraph	Personnel matter, legal opinion	The redacted material is exempt from disclosure under the personnel matter exemption of OPRA set forth at <u>N.J.S.A. 47:1A-10</u> .
Meeting minutes dated 1/28/2008 (cont'd)	Meeting minutes dated 1/28/2008	Page 2, fifth paragraph to page 5	Personnel matter	The redacted material is exempt from disclosure under the personnel matter exemption of

¹ **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.

				OPRA set forth at <u>N.J.S.A. 47:1A-10</u> .
Meeting minutes dated 5/19/2008, 3 pages	Meeting minutes dated 5/19/2008	Redacted in their entirety	Personnel matter	The redacted material is exempt from disclosure under the personnel matter exemption of OPRA set forth at <u>N.J.S.A. 47:1A-10</u> .
Meeting minutes dated 6/23/2008, 6 pages	Meeting minutes dated 6/23/2008	Redacted from Page 2 to conclusion	Personnel matter	The redacted material is exempt from disclosure under the personnel matter exemption of OPRA set forth at <u>N.J.S.A. 47:1A-10</u> .
Meeting minutes dated 6/23/2008 (cont'd)	Voting Record	Second block under "Motion" redacted	None given	The redacted material is exempt from disclosure under the personnel matter exemption of OPRA set forth at <u>N.J.S.A. 47:1A-10</u> .

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 22nd Day of December, 2009

Robin Berg Tabakin, Chair
Government Records Council

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

Harlynn A. Lack, Secretary
Government Records Council

Decision Distribution Date: January 5, 2010

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

***In Camera* Findings and Recommendations of the Executive Director
December 22, 2009 Council Meeting**

**Anonymous¹
Complainant**

GRC Complaint No. 2008-257

v.

**Franklin Township Fire District No. 1²
Custodian of Records**

Records Relevant to Complaint:³

1. For any nonpublic meeting (e.g., closed or executive session) held by the Board of the Fire District between June 1, 2006 and the current date, copies of:
 - a) The resolutions or motions as required by N.J.S.A. 10:4-13 that authorized the exclusion of the public from the closed meetings;
 - b) The minutes of the closed meetings, redacted as narrowly as possible, if at all.

Request Made: July 9, 2008

Response Made: July 18, 2008

Custodian: Tim Szymborski, Fire Commissioner

GRC Complaint Filed: November 12, 2008⁴

Background

September 30, 2009

Government Records Council's Interim Order. At the September 30, 2009 public meeting, the Government Records Council ("Council") considered the September 23, 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. Because the evidence of record indicates that the Custodian sought, in writing, an extension of time to provide a response to the request within the statutorily-mandated seven (7) business day response period, and because the Custodian provided records responsive within the extended response period and provided a legal basis for the non-disclosure of the remainder of the records, the Custodian provided a timely and sufficient response to the Complainant's

¹Represented by Walter M. Luers, Esq., of the Law Offices of Walter M. Luers (Oxford, NJ).

²Represented by William T. Cooper, III, Esq., of Cooper & Cooper (Somerville, NJ).

³ Additional records were requested which are not the subject of this complaint.

⁴ The GRC received the Denial of Access Complaint on said date.

request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).

2. 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 following requested records to determine the validity of the Custodian's assertion that the records contain attorney-client privileged information which is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1 and personnel matters exempt from disclosure pursuant to N.J.S.A. 47:1A-10:

- Resolution 06-18
- Resolution 08-01
- Resolution 08-03
- Resolution 08-04
- Resolution 08-08
- Resolution 08-20
- Resolution 08-21
- Special Meeting Minutes dated July 5, 2006
- Meeting minutes dated December 10, 2007
- Executive session meeting minutes dated January 28, 2008
- Executive session meeting minutes dated May 19, 2008
- Executive session meeting minutes dated June 23, 2008

3. **The Custodian must deliver⁵ to the Council in a sealed envelope nine (9) copies of the requested unredacted documents set forth at paragraph 2 above, a document or redaction index,⁶ as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,⁷ 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.**

The Council also directs the Custodian to provide a certification that the July 5, 2006 meeting minutes are the official and only version of such minutes in existence, as well as any Resolution or motion authorizing the July 5, 2006 executive session meeting, or a certification that such Resolution or motion does not exist.

4. The Council defers analysis of whether the Custodian's response failed to set forth a specific legal basis for the denial of access to the requested records pending the Custodian's compliance with the Council's Interim Order.

⁵ 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.

⁶ The document or redaction index should identify the document 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."

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.

October 5, 2009

Council's Interim Order distributed to the parties.

October 13, 2009

Certification of the Custodian in response to the Council's Interim Order with the following attachments:

1. Certification of Custodian enclosing nine (9) copies each of the requested unredacted documents set forth at paragraph #2 of the Interim Order;
2. Certification of Custodian regarding the July 5, 2006 Meeting Minutes, attaching the approved meeting minutes for July 5, 2006 and the draft minutes thereof.

The Custodian certifies that he is a Commissioner for Franklin Township Fire District No. 1. The Custodian further certifies that he currently services as the Clerk of the Franklin Township Fire District No. 1 and, in that capacity, he keeps the minutes of the Commissioners' meetings. The Custodian also certifies that such meeting minutes are typically typed and presented to the Commissioners for approval. The Custodian certifies that he prepared typed minutes for the July 5, 2006 meeting, however, he was requested to make corrections to those minutes. The Custodian also certifies that the corrections were made and the meeting minutes were subsequently approved. The Custodian certifies that the draft minutes were not destroyed. The Custodian further certifies that the draft minutes were never approved by the Commissioners.

November 10, 2009

Telephone call from the GRC to Custodian's Counsel. The GRC requests that the Custodian's Counsel provide a redaction index, as well as a copy of the redacted records for the completion of the *in camera* review.

November 13, 2009⁸

Custodian Counsel's letter to the GRC. Custodian's Counsel provides the requested redaction index and copies of the redacted records.

November 16, 2009

Telephone call from the GRC to Custodian's Counsel. The GRC requests that the Custodian's Counsel provide a supplementary redaction index for Resolution 08-21 and the meeting minutes dated December 10, 2007.

⁸ Received by the Government Records Council on November 19, 2009.

November 23, 2009

Telephone call from Custodian's Counsel to the GRC. Custodian's Counsel states that he believes that Resolution 08-21 and the meeting minutes dated December 10, 2007 were previously provided unredacted to the Complainant. Custodian's Counsel states that he will confirm this with Complainant's Counsel.

November 25, 2009

Letter from Custodian's Counsel to the GRC. Custodian's Counsel confirms that Resolution 08-21 and the meeting minutes dated December 10, 2007 were previously provided in unredacted form to the Complainant and asserts that there are no issues with respect to these records which require the GRC's review.

November 25, 2009

E-mail from the GRC to Complainant's Counsel. The GRC requests that the Complainant's Counsel confirm that Resolution 08-21 and the meeting minutes dated December 10, 2007 were previously provided to him in unredacted form and, moreover, that there are no outstanding issues with regard to these records.

November 25, 2009

E-mail from Complainant's Counsel to the GRC. Complainant's Counsel confirms that Resolution 08-21 and the meeting minutes dated December 10, 2007 were previously provided to him in unredacted form and, moreover, that there are no outstanding issues with regard to these records.

December 11, 2009

Telephone call from the GRC to Custodian's Counsel. The GRC requests that the Custodian's Counsel provide a legal certification that the following records provided to the Complainant on July 25, 2008 were provided in unredacted form:

- Resolution 06-18
- Resolution 08-01
- Resolution 08-03
- Resolution 08-04
- Resolution 08-08
- Resolution 08-20
- Special Meeting Minutes dated July 5, 2006

December 14, 2009

Custodian Counsel's certification. Custodian's Counsel certifies that the records provided to the Complainant on July 25, 2008 were provided in unredacted form.

Analysis**Whether the Custodian complied with the Council's September 30, 2009 Interim Order?**

At its September 30, 2009 public meeting, the Council determined that because the Custodian has asserted that the requested records were lawfully denied as containing attorney-client privileged information which is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1 and personnel matters exempt from disclosure pursuant to N.J.S.A. 47:1A-10, the Council must determine whether the legal conclusions asserted by the Custodian are properly applied to the records 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 records to determine the validity of the Custodian's assertion that the requested records were properly denied.

The Council therefore ordered the Custodian to deliver to the Council in a sealed envelope nine (9) copies of the requested unredacted documents, 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 documents provided are the documents 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 no later than October 12, 2009.

The Custodian provided the GRC with the requested records and the Custodian's certification in compliance with the Council's September 30, 2009 Interim Order on October 12, 2009, in a timely manner. However, the Custodian did not include a document or redaction index at that time. The Custodian did, however, submit such redaction index on November 12, 2009. Therefore, the Custodian did not timely comply with the Council's September 30, 2009 Interim Order.

Whether the Custodian unlawfully denied the Complainant access to the records requested?

The Custodian asserts in the Statement of Information that he lawfully denied the Complainant access to portions of the requested records because said portions of records contain attorney-client privileged information which is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1 and personnel matters exempt from disclosure pursuant to N.J.S.A. 47:1A-10. Conversely, the Complainant asserts that he was unlawfully denied access to the requested records. Moreover, the evidence of record⁹ indicates that the following records are at issue:

- Executive session meeting minutes dated January 28, 2008
- Executive session meeting minutes dated May 19, 2008
- Executive session meeting minutes dated June 23, 2008

The Open Public Meetings Act provides that a public body may exclude the public only from that portion of a meeting at which the public body discusses:

“Any pending or anticipated litigation ...in which the public body is, or may become a party.

⁹ Pursuant to the Complainant's Counsel's e-mail to the GRC dated November 25, 2009 and the certification of Custodian's Counsel dated December 14, 2009.

Any matters falling within the attorney-client privilege, to the extent that confidentiality is required in order for the attorney to exercise his ethical duties as a lawyer.

Any matter involving the employment, appointment, termination of employment, terms and conditions of employment, evaluation of the performance of, promotion or disciplining of any specific prospective public officer or employee or current public officer or employee employed or appointed by the public body, unless all the individual employees or appointees whose rights could be adversely affected request in writing that such matter or matters be discussed at a public meeting.” N.J.S.A. 10:4-12 (7), (8).

The Open Public Meetings Act also provides that:

“No public body shall exclude the public from any meeting to discuss any matter described in [N.J.S.A. 10:4-12(b)] until the public body shall first adopt a resolution, at a meeting to which the public shall be admitted:

- a. Stating the general nature of the subject to be discussed; and
- b. Stating as precisely as possible, the time when and the circumstances under which the discussion conducted in closed session of the public body can be disclosed to the public.” N.J.S.A. 10:4-13.

The Open Public Meetings Act further provides that:

“Each public body shall keep reasonably comprehensible minutes of all its meetings showing the time and place, the members present, the subjects considered, the actions taken, the vote of each member, and any other information required to be shown in the minutes by law, which shall be promptly available to the public to the extent that making such matters public shall not be inconsistent with [N.J.S.A. 10:4-12]” N.J.S.A. 10:4-14.

OPRA provides that:

“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.

Moreover, OPRA excludes from the definition of a government record any record within the attorney client privilege. N.J.S.A. 47:1A-1.1. In New Jersey, protecting confidentiality within the attorney-client relationship has long been recognized by the courts. *See, e.g. Matter of Grand Jury Subpoenas*, 241 N.J. Super. 18 (App. Div. 1989). In general, the attorney-client privilege renders as confidential communications between a lawyer and a client made in the course of that professional relationship. *See N.J.S.A. 2A: 84A-20 and Fellerman v. Bradley, 99 N.J. 493, 498-99 (1985). Rule 504 (1) of the New Jersey Rules of Evidence provides that communications between a lawyer and client, “in the course of that relationship and in professional confidence, are*

privileged....” Such communications as discussion of litigation strategy, evaluation of liability, potential monetary exposure and settlement recommendations are considered privileged. The Press of Atlantic City v. Ocean County Joint Insurance Fund, 337 N.J. Super. 480, 487 (Law Div. 2000). Also confidential are mental impressions, legal conclusions, and opinions or theories of attorneys. In Re Environmental Ins. Actions, 259 N.J. Super. 308, 317 (App. Div. 1992).

The attorney-client privilege "recognizes that sound legal advice or advocacy serves public ends and that the confidentiality of communications between client and attorney constitutes an indispensable ingredient of our legal system." Matter of Grand Jury Subpoenas, 241 N.J. Super. 18, 27-8 (App.Div.1989). The attorney-client privilege protects communications between a lawyer and the client made in the course of that professional relationship, and particularly protects information which, if disclosed, would jeopardize the legal position of the client. N.J.S.A. 2A:84A-20; RPC 1.6. The New Jersey Supreme Court has observed that RPC 1.6 “expands the scope of protected information to include all information relating to the representation, regardless of the source or whether the client has requested it be kept confidential or whether disclosure of the information would be embarrassing or detrimental to the client.” In re Advisory Opinion No. 544 of N.J. Sup. Court, 103 N.J. 399, 406 (1986).

Redaction of otherwise public documents is appropriate where protection of privileged or confidential subject matter is a concern. South Jersey Publishing Co., Inc. v. N. J. Expressway Authority, 124 N.J. 478, 488-9 (1991). Moreover, whether the matter contained in the requested documents pertains to pending or closed cases is important, because the need for confidentiality is greater in pending matters. Keddie v. Rutgers, State University, 148 N.J. 36, 54 (1997). Nevertheless, "[e]ven in closed cases. . .attorney work-product and documents containing legal strategies may be entitled to protection from disclosure." *Id.*

An *in camera* examination was performed on the submitted records. The results of this 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> Examination ¹⁰

¹⁰ **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 Anonamous v. Franklin Township Fire District No. 1, 2008-257 – *In Camera* Findings and Recommendations of the Executive Director 7

Meeting minutes dated 1/28/2008, 5 pages	Meeting minutes dated 1/28/2008	Page 2, third paragraph	Personnel matter, legal opinion	The redacted material is exempt from disclosure under the personnel matter exemption of OPRA set forth at <u>N.J.S.A. 47:1A-10</u> .
Meeting minutes dated 1/28/2008 (cont'd)	Meeting minutes dated 1/28/2008	Page 2, fifth paragraph to page 5	Personnel matter	The redacted material is exempt from disclosure under the personnel matter exemption of OPRA set forth at <u>N.J.S.A. 47:1A-10</u> .
Meeting minutes dated 5/19/2008, 3 pages	Meeting minutes dated 5/19/2008	Redacted in their entirety	Personnel matter	The redacted material is exempt from disclosure under the personnel matter exemption of OPRA set forth at <u>N.J.S.A. 47:1A-10</u> .
Meeting minutes dated 6/23/2008, 6 pages	Meeting minutes dated 6/23/2008	Redacted from Page 2 to conclusion	Personnel matter	The redacted material is exempt from disclosure under the personnel matter exemption of OPRA set forth at <u>N.J.S.A. 47:1A-10</u> .
Meeting minutes dated 6/23/2008 (cont'd)	Voting Record	Second block under "Motion" redacted	None given	The redacted material is exempt from disclosure under the personnel matter exemption of

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.

				OPRA set forth at <u>N.J.S.A. 47:1A-10.</u>
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Thus, the Custodian lawfully denied the Complainant access to portions of the requested records because said portions of records contain attorney-client privileged information which is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1 and personnel matters exempt from disclosure pursuant to N.J.S.A. 47:1A-10.

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?

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).

Although the Custodian failed to comply with the Council’s September 30, 2009 Interim Order within five (5) business days of receipt of the Order by failing to provide a redaction index, the Custodian did ultimately comply with the Council’s September 30, 2009 Interim Order on November 12, 2009. Moreover, the results of the *in camera*

review determine that the Custodian lawfully denied access to the requested records since the redacted portions are exempt from disclosure pursuant to the personnel exemption of OPRA at N.J.S.A. 47:1A-10. Therefore, it is concluded that 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.

Whether the Complainant is a “prevailing party” pursuant to N.J.S.A. 47:1A-6 and entitled to reasonable 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 court held that a complainant is a “prevailing party” if he/she 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.*

In Teeters, the complainant appealed from a final decision of the Government Records Council which denied an award for attorney's fees incurred in seeking access to certain public records via two complaints she filed under the Open Public Records Act (OPRA), N.J.S.A. 47:1A-6 and N.J.S.A. 47:1A-7.f., against the Division of Youth and Family Services (“DYFS”). The records sought involved an adoption agency having falsely advertised that it was licensed in New Jersey. DYFS eventually determined that the adoption agency violated the licensing rules and reported the results of its investigation to the complainant. The complainant received the records she requested upon entering into a settlement with DYFS. The court found that the complainant engaged in reasonable efforts to pursue her access rights to the records in question and sought attorney assistance only after her self-filed complaints and personal efforts were unavailing. *Id.* at 432. With that assistance, she achieved a favorable result that reflected an alteration of position and behavior on DYFS’s part. *Id.* As a result, the complainant was a prevailing party entitled to an award of a reasonable attorney's fee. Accordingly, the Court remanded the determination of reasonable attorney’s fees to the GRC for adjudication.

Additionally, the New Jersey Supreme Court has ruled on the issue of “prevailing party” attorney’s fees. In Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), the court discussed the catalyst theory, “which posits that a plaintiff is a ‘prevailing party’ if it achieves the desired result because the lawsuit brought about a voluntary change in the defendant’s conduct.” Mason, supra, at 71, (quoting Buckhannon Board & Care Home v. West Virginia Department of Health & Human Resources, 532 U.S. 598, 131 S. Ct. 1835, 149 L. Ed. 2d 855 (2001)). The court in Buckhannon 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 court in Mason, supra, at 76, held that “requestors 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 (1984).”

In the matter now before the Council, the evidence of record indicates that the Custodian disclosed records to the Complainant on July 25, 2008 and on October 10, 2008 disclosed unredacted copies of Resolution 08-21 and meeting minutes dated December 10, 2007, as well as redacted copies of Executive Session meeting minutes dated January 28, 2008, May 19, 2008 and June 23, 2008. The Denial of Access Complaint in this matter was filed on November 12, 2008. Moreover, the results of the *in camera* review have determined that the Custodian lawfully denied access to the requested records since the redacted portions are exempt from disclosure pursuant to the personnel exemption of OPRA at N.J.S.A. 47:1A-10. Therefore, the Complainant is not a prevailing party entitled to an award of prevailing party attorney fees.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Although the Custodian provided the GRC with the requested records and the Custodian’s certification in compliance with the Council’s September 30, 2009 Interim Order on October 12, 2009, in a timely manner, the Custodian did not include a document or redaction index at that time. The Custodian did, however, submit such redaction index on November 12, 2009. Therefore, the Custodian did not timely comply with the Council’s September 30, 2009 Interim Order.
2. The *In Camera* Examination set forth in the above table reveals the Custodian has lawfully denied access to the requested record as personnel material pursuant to N.J.S.A. 47:1A-10. As such, the Custodian has borne his burden of proving a lawful denial of access pursuant to N.J.S.A. 47:1A-6.
3. Although the Custodian failed to comply with the Council’s September 30, 2009 Interim Order within five (5) business days of receipt of the Order by failing to provide a redaction index, the Custodian did ultimately comply with the Council’s September 30, 2009 Interim Order on November 12, 2009. Moreover, the results of the *in camera* review determine that the Custodian lawfully denied access to

the requested records since the redacted portions are exempt from disclosure pursuant to the personnel exemption of OPRA at N.J.S.A. 47:1A-10. Therefore, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

4. Because the evidence of record indicates that the Custodian disclosed records to the Complainant on July 25, 2008 and on October 10, 2008 disclosed unredacted copies of Resolution 08-21 and meeting minutes dated December 10, 2007 as well as redacted copies of Executive Session meeting minutes dated January 28, 2008, May 19, 2008 and June 23, 2008, and because the Denial of Access Complaint in this matter was filed on November 12, 2008, and because the results of the *in camera* review have determined that the Custodian lawfully denied access to the requested records since the redacted portions are exempt from disclosure pursuant to the personnel exemption of OPRA at N.J.S.A. 47:1A-10, the Complainant is not a prevailing party entitled to an award of prevailing party attorney fees.

Prepared By: Karyn G. Gordon, Esquire
In House Counsel

Approved By: Catherine Starghill, Esq.
Executive Director

September 23, 2009



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

INTERIM ORDER

September 30, 2009 Government Records Council Meeting

Anonymous
Complainant

Complaint No. 2008-257

v.

Franklin Township Fire District No. 1
Custodian of Record

At the September 30, 2009 public meeting, the Government Records Council (“Council”) considered the September 23, 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. Because the evidence of record indicates that the Custodian sought, in writing, an extension of time to provide a response to the request within the statutorily-mandated seven (7) business day response period, and because the Custodian provided records responsive within the extended response period and provided a legal basis for the non-disclosure of the remainder of the records, the Custodian provided a timely and sufficient response to the Complainant’s request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).
2. 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 following requested records to determine the validity of the Custodian’s assertion that the records contain attorney-client privileged information which is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1 and personnel matters exempt from disclosure pursuant to N.J.S.A. 47:1A-10:
 - Resolution 06-18
 - Resolution 08-01
 - Resolution 08-03
 - Resolution 08-04
 - Resolution 08-08



- Resolution 08-20
 - Resolution 08-21
 - Special Meeting Minutes dated July 5, 2006
 - Meeting minutes dated December 10, 2007
 - Executive session meeting minutes dated January 28, 2008
 - Executive session meeting minutes dated May 19, 2008
 - Executive session meeting minutes dated June 23, 2008
3. **The Custodian must deliver¹ to the Council in a sealed envelope nine (9) copies of the requested unredacted documents set forth at paragraph 2 above, a document or redaction index,² as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,³ that the documents provided are the documents 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.**

The Council also directs the Custodian to provide a certification that the July 5, 2006 meeting minutes are the official and only version of such minutes in existence, as well as any Resolution or motion authorizing the July 5, 2006 executive session meeting, or a certification that such Resolution or motion does not exist.

4. The Council defers analysis of whether the Custodian's response failed to set forth a specific legal basis for the denial of access to the requested records pending the Custodian's compliance with the Council's Interim Order.
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
Government Records Council
On The 30th Day of September, 2009

¹ 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.

² The document or redaction index should identify the document 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."

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: October 5, 2009

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
September 30, 2009 Council Meeting**

**Anonymous¹
Complainant**

GRC Complaint No. 2008-257

v.

**Franklin Township Fire District No. 1²
Custodian of Records**

Records Relevant to Complaint:³

1. For any nonpublic meeting (e.g., closed or executive session) held by the Board of the Fire District between June 1, 2006 and the current date, copies of:
 - a) The resolutions or motions as required by N.J.S.A. 10:4-13 that authorized the exclusion of the public from the closed meetings;
 - b) The minutes of the closed meetings, redacted as narrowly as possible, if at all.

Request Made: July 9, 2008

Response Made: July 18, 2008

Custodian: Tim Szymborski, Fire Commissioner

GRC Complaint Filed: November 12, 2008⁴

Background

July 9, 2008

Complainant's Open Public Records Act ("OPRA") request. The Complainant requests the records relevant to this complaint listed above in a letter attached to an official OPRA request form.

July 18, 2008

Custodian's response to the OPRA request. On behalf of the Custodian, Custodian's Counsel responds in writing to the Complainant's OPRA request on the seventh (7th) business day following receipt of such request. The Custodian's Counsel requests an extension of time of one week to respond to the Complainant's request.

¹Represented by Walter M. Luers, Esq., of the Law Offices of Walter M. Luers (Oxford, NJ).

²Represented by William T. Cooper, III, Esq., of Cooper & Cooper (Somerville, NJ).

³Additional records were requested which are not the subject of this complaint.

⁴The GRC received the Denial of Access Complaint on said date.

July 21, 2008⁵

Letter from Complainant's Counsel to Custodian's Counsel. Complainant's Counsel consents to the requested extension of time.

July 25, 2008

Letter from Custodian's Counsel to the Complainant. Custodian's Counsel attaching the following records responsive to the request:

- Resolution 06-18
- Resolution 08-01
- Resolution 08-03
- Resolution 08-04
- Resolution 08-08
- Resolution 08-20
- Special Meeting Minutes dated July 5, 2006

Custodian's Counsel asserts that minutes from meetings conducted on December 10, 2007, January 28, 2008 and May 19, 2008 have not been disclosed because these minutes contain items that fall within the exception to disclosure at N.J.S.A. 10:4-12(b)(3); such minutes therefore cannot be disclosed at this time.⁶

August 22, 2008

Letter from Complainant's Counsel to Custodian's Counsel. Complainant's Counsel disputes Custodian Counsel's response to the OPRA request dated July 25, 2008. Complainant's Counsel states that an executive session meeting of the District Board was held on June 23, 2008, but the Custodian's Counsel failed to provide a resolution authorizing that executive session. Complainant's Counsel requests that Custodian's Counsel provide the resolution or state the reasons it is being withheld. Complainant's Counsel also requests that Custodian's Counsel provide a copy of any draft of the executive session meeting minutes.

Complainant's Counsel further states that the January 28, 2008 and May 19, 2008 resolutions authorizing an executive session on the same date states that the executive session minutes can be released thirty (30) days after the meeting. Complainant's Counsel requests that Custodian's Counsel disclose the requested minutes.

Complainant's Counsel states that no resolution concerning the December 10, 2007 minutes was disclosed and asks that Custodian's Counsel release such resolution.

Complainant's Counsel objects to the non-disclosure of the December 10, 2007, January 28, 2008 and May 19, 2008 executive session meeting minutes. Complainant's Counsel asserts that under OPRA, the entire minutes cannot be withheld; rather, the appropriate course of action is to redact those portions of the minutes which may be

⁵ Although this letter is dated July 25, 2008, the fax transmission cover page accompanying the letter indicates a transmission date of July 21, 2008.

⁶ The Custodian's response also addresses additional records requested which are not the subject of this complaint.

exempt from OPRA. Complainant's Counsel requests that Custodian's Counsel disclose redacted versions of the minutes.

Complainant's Counsel asks why the July 5, 2006 meeting was held in executive session and notes that the minutes do not describe any "personnel matter." Complainant's Counsel states that the Commissioners discussed differences of opinion as to how the Fire District should be managed.

Complainant's Counsel asks that Custodian's Counsel confirm that the July 5, 2006 minutes which were disclosed are the official and only version of the minutes in existence.

Complainant's Counsel states that no resolution authorizing the July 5, 2006 executive session was disclosed and asks Custodian's Counsel to confirm whether same exists and, if so, to provide a copy.

Complainant's Counsel requests that Custodian's Counsel disclose resolutions authorizing executive sessions for meetings held on June 25, 2007, January 7, 2008 and February 25, 2008.

Complainant's Counsel states that Custodian's Counsel should provide these additional materials no later than August 29, 2008.

August 27, 2008

Letter from Custodian's Counsel to Complainant's Counsel. Custodian's Counsel states that it will not be possible to respond to Complainant's Counsel's August 22, 2008 letter by August 29, 2008 because the District needs additional time to review the request and determine if additional records are available. Custodian's Counsel also notes that he will be on vacation from August 28, 2008 to September 2, 2008.

September 12, 2008

Letter from Custodian's Counsel to the Complainant's Counsel. Custodian's Counsel states that he is awaiting receipt of additional records from the District. Custodian's Counsel further states that he will respond to Complainant's Counsel's follow-up request dated August 22, 2008 on or before September 19, 2008.

October 10, 2008

Letter from Custodian's Counsel to the Complainant's Counsel, attaching the following additional material requested by Complainant's Counsel:⁷

- Resolution 08-21
- Meeting minutes dated December 10, 2007
- Executive session meeting minutes dated January 28, 2008
- Executive session meeting minutes dated May 19, 2008
- Executive session meeting minutes dated June 23, 2008

⁷ Additional records were also provided; such records are not the subject of this complaint.
Anonymous v. Franklin Township Fire District No. 1, 2008-257 – Findings and Recommendations of the Executive Director

Custodian's Counsel notes that the meeting minutes provided were redacted to protect certain personnel issues discussed therein.

November 12, 2008

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

- Complainant's OPRA request dated July 9, 2008
- Letter from Custodian's Counsel to Complainant's Counsel dated July 18, 2008
- Letter from Custodian's Counsel to Complainant's Counsel dated July 25, 2008 (with attachments)
- Letter from Complainant's Counsel to Custodian's Counsel transmitted July 21, 2008
- Letter from Complainant's Counsel to Custodian's Counsel dated August 22, 2008
- Letter from Custodian's Counsel to Complainant's Counsel dated August 27, 2008
- Letter from Custodian's Counsel to Complainant's Counsel dated September 12, 2008
- Letter from Custodian's Counsel to Complainant's Counsel dated October 10, 2008 (with attachments).

The Complainant's Counsel asserts that the Custodian improperly redacted several records that do not appear to be privileged or confidential and failed to provide a legal basis for the redactions. Complainant's Counsel also asserts that the Custodian denied access to requested records by failing to disclose same upon initial request or within the agreed-upon extension date. Complainant's Counsel requests that the GRC:

1. Determine whether the Custodian violated OPRA by failing to set forth a detailed and lawful basis for its redactions;
2. Determine whether the Custodian violated OPRA by failing to provide records pursuant to the Complainant's initial OPRA request and the extension date;
3. Determine whether the Custodian denied access to records by impermissibly redacting information not subject to lawful redaction;
4. Determine whether the records requestor is a prevailing party entitled to an award of reasonable attorneys' fees;
5. Determine whether the Custodian's actions constituted a knowing and willful violation of OPRA.

Complainant's Counsel contends that on July 9, 2008, an OPRA request was transmitted to the Custodian which sought, in pertinent part, copies of minutes of closed or executive session meetings held by the Board of Fire District from June 1, 2006 to July 9, 2008, as well as the resolutions or motions that authorized the executive or closed session meetings, as required by N.J.S.A. 10:4-13.

Complainant's Counsel states that on July 18, 2008, the Custodian advised that additional time would be necessary to gather the requested records. Custodian's Counsel also states that on July 21, 2008, he consented to an extension of time to July 25, 2008 for

the Custodian to respond to the OPRA request. Complainant's Counsel asserts that although the Custodian provided many of the requested records on July 25, 2008, meeting minutes for December 10, 2007, January 28, 2008 and May 19, 2008 were not disclosed.

Complainant's Counsel further asserts that the Custodian's July 25, 2008 response to the OPRA request omitted several other records. Complainant's Counsel contends that those omissions, as well as a second request for the three sets of minutes that were previously withheld, were detailed in a letter from Complainant's Counsel to Custodian's Counsel dated August 22, 2008, in which Complainant's Counsel suggested that the Custodian respond by August 29, 2008. Complainant's Counsel contends that on August 27, 2008, the Custodian's Counsel responded, stating that the August 29, 2008 deadline could not be met. Complainant's Counsel asserts that the Custodian's Counsel failed to provide a specific date by which a response would be forthcoming. Complainant's Counsel asserts that Custodian's Counsel later stated in a letter dated September 12, 2008 that a response could be expected by September 19, 2008.

Complainant's Counsel contends that on October 10, 2008, the Custodian provided redacted copies of the following records, without justification for such redactions:

- Resolution 08-21
- Meeting minutes dated December 10, 2007
- Executive session meeting minutes dated January 28, 2008
- Executive session meeting minutes dated May 19, 2008
- Executive session meeting minutes dated June 23, 2008

Complainant's Counsel argues that OPRA requires that "government records shall be readily accessible for inspection, copying for examination by the citizens of this State, with certain exceptions, for the protection of the public interest, and any limitations on the right of access accorded [under OPRA] ... shall be construed in favor of the public's right of access." Libertarian Party of Cent. New Jersey v. Murphy, 387 N.J. Super. 236, 239 (App. Div. 2006) citing N.J.S.A. 47:1A-1. "The purpose of OPRA 'is to maximize public knowledge about public affairs in order to ensure an informed citizenry and to minimize the evils inherent in a secluded process.'" Times of Trenton Pub. Corp. v. Lafayette Yard Community Development Corp., 183 N.J. 519, 53 (2005), quoting Asbury Park Press v. Ocean County Prosecutor's Office, 374 N.J. Super. 312, 329 (Law Div. 2004)). Complainant's Counsel contends that there is no question that the records requested are public records under N.J.S.A. 47:1A-1.1. Complainant's Counsel argues that the Custodian violated OPRA and denied access to the requested records in failing to set forth a detailed and lawful basis for each and every redaction that was made on the records disclosed. Paff v. Borough of Lavallette, GRC Complaint No. 2007-209 (June 25, 2008 Interim Order); see also Paff v. Township of Plainsboro, GRC Complaint No. 2005-29 (July 2005)(ordering the records custodian to provide explanations for the redactions); Barbara Schwarz v. N.J. Dep't of Human Services, GRC Complaint No. 2004-60 (February 2005)(requiring specific citations to the law allowing the redactions).

Complainant's Counsel argues that the Custodian herein has the burden of stating the specific basis for denying access and to produce specific reliable evidence sufficient to meet a statutorily recognized basis for confidentiality. Courier News v. Hunterdon County Prosecutor's Office, 358 N.J. Super. 373, 382-83 (App. Div. 2003). Complainant's Counsel also argues that the Custodian must also explain redactions in a manner that will enable other parties to assess the applicability of the privilege or protection. Paff v. New Jersey Dep't of Labor, Board of Review, 379 N.J. Super. 346, 354-55 (App. Div. 2005). Complainant's Counsel contends that in such cases, the GRC must perform an *in camera* review of the challenged documents. Hartz Mountain v. NJSEA, 369 N.J. Super. 175, 183 (App. Div. 2004).

Complainant's Counsel states that the GRC should order the Custodian to either produce unredacted versions of the records requested or submit each and every record for an *in camera* review by the GRC, along with a redaction index describing the specific legal basis for each and every redaction.

Complainant's Counsel asserts that the GRC should:

1. Find that the Custodian violated OPRA by failing to set forth a detailed and lawful basis for its redactions;
2. Find that the Custodian violated OPRA by failing to provide the requested records in a timely manner;
3. Conduct an *in camera* review of the redacted records to determine whether the redactions were consistent with OPRA
4. Hold that the requestor of the records is the prevailing party and award a reasonable attorneys' fee; and
5. Investigate and determine whether the Custodian's actions were a knowing and willful violation of OPRA.

The Complainant does not agree to mediate this complaint.

November 20, 2008

Request for the Statement of Information ("SOI") sent to the Custodian.

November 24, 2008

Telephone call from Custodian's Counsel to the GRC. Custodian's Counsel requests a six (6) day extension of time to complete and return the SOI.

November 24, 2008

Fax transmission from GRC to the Custodian's Counsel. The GRC grants the request for an extension of time to return the SOI to December 3, 2008.

December 1, 2008

Custodian's SOI with the following attachments:

- Letter from Custodian's Counsel to Complainant's Counsel dated July 25, 2008 (with attachments)

- Letter from Custodian's Counsel to Complainant's Counsel dated August 27, 2008
- Letter from Custodian's Counsel to Complainant's Counsel dated September 12, 2008
- Letter from Custodian's Counsel to Complainant's Counsel dated October 10, 2008

Custodian's Counsel asserts that the records responsive to the Complainant's OPRA request are the executive portion of meeting minutes for the District Fire Board meetings for January 28, 2008, May 19, 2008 and June 23, 2008. The Custodian certified that these records have been retained by the agency.

The Custodian further certified that meeting minutes dated June 23, 2008 were redacted to delete the Commissioner's discussion of a personnel matter. In addition, the Commissioners discussed legal opinions that were provided through the attorney-client relationship.

The Custodian also certified that meeting minutes dated January 28, 2008 were redacted, first to delete a portion of the Commissioners' discussion regarding the application of a new member because this discussion also contained a legal opinion rendered to the Commissioners, which is subject to the attorney-client privilege. The Custodian further certified that a second portion of the January 28, 2008 meeting minutes was redacted to remove the Commissioners' discussion regarding a disciplinary matter against a member.

Finally, the Custodian certified that meeting minutes dated May 19, 2008 were redacted in their entirety because the meeting dealt with a grievance filed against a member of the District that resulted in disciplinary action against that member.

The Custodian contends that under OPRA, the personnel records of any individual that are in the possession of a public agency including, but not limited to, records relating to any grievance filed by or against an individual, will not be considered a government records and shall not be made available for public access. See N.J.S.A. 47:1A-10. The Custodian further contends that, in the instant matter, the meeting minutes of January 28, 2008, May 19, 2008 and June 23, 2008 contained materials that fell within the definition of N.J.S.A. 47:1A-10. The Custodian states that the meeting minutes of January 28, 2008 show the Board of Commissioners going into executive session to discuss a personnel matter at 9:45 pm; therefore, that portion of the minutes was redacted and not made available. The Custodian states that the meeting minutes of May 19, 2008 again noted the Board going into executive session; the Commissioners' discussion at this point again dealt with the personnel issue first addressed on January 28, 2008. The Custodian further states that the June 23, 2008 meeting minutes reflect that the Commissioners went into executive session at 7:35 pm, again to address the personnel matter from January 28, 2008. The Custodian contends that the Commissioners also discussed legal work product provided to them by counsel. The Custodian argues that the redacted portion of the aforementioned meetings was appropriately redacted under the circumstances of this case because the Commissioners discussed personnel matters that involved more than one member of the district and, as a rule, public employees' personnel files and employee

grievances are not considered government records. The Custodian maintains that the redaction of the aforementioned meeting minutes was therefore appropriate and not in violation of OPRA.

December 3, 2008

Letter from Complainant's Counsel to the GRC. Complainant's Counsel replies to the Custodian's SOI, stating that the Custodian is, for the first time, alleging that some of the requested records are subject to the attorney client privilege. Complainant's Counsel asserts that it is impossible to determine from the Custodian's submissions the reasons applicable to each redaction. Complainant's Counsel maintains that the Custodian should provide a Vaughn index listing the specific redactions and the reasons therefor, which should also include the names of the attorneys who provided legal advice.

Complainant's Counsel also asserts that the Custodian provided no justification for the redaction of the name of a motion made by the Fire District at its June 23, 2008 meeting.

Complainant's Counsel contends that the Custodian appears to be abusing the exceptions to OPRA by redacting entire pages of minutes. Complainant's Counsel states that OPRA is to be construed narrowly and asserts that the attorney client privilege is not absolute. Complainant's Counsel contends that not every communication between a lawyer and his client is privileged; instead, only those communications that are made in confidence and where lawful legal advice is given are protected by the privilege. Complainant's Counsel maintains that the Custodian has not met the burden of proving that the records in question are protected by the privilege.

Complainant's Counsel requests that the GRC determine the following:

- 1) Whether the Custodian violated OPRA by failing to set forth a detailed and lawful basis for the redactions;
- 2) Whether the Custodian violated OPRA by failing to provide documents pursuant to the Complainant's initial OPRA request and the extension date;
- 3) Whether the Custodian unlawfully denied access to documents by impermissibly redacting information not subject to lawful redaction;
- 4) Whether the Complainant is the prevailing party and, if so, award a reasonable attorney's fee;
- 5) Determine whether the Custodian's actions were knowing and willful.

Custodian's Counsel also requests that the GRC require the Custodian to provide a Vaughn index and that the GRC conduct an in camera review of the redacted documents to determine the propriety of the custodian's assertions of privilege.

Analysis

Whether the Custodian unlawfully denied access to the requested records?

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 ...” (Emphasis added.) N.J.S.A. 47:1A-1.1.

OPRA states that:

“[a] request for access to a government record shall be in writing and hand-delivered, mailed, transmitted electronically, or otherwise conveyed to the appropriate custodian.

...

If the custodian is unable to comply with a request for access, the custodian shall indicate the specific basis therefor on the request form and promptly return it to the requestor.

...

If the custodian of a government record asserts that part of a particular record is exempt from public access pursuant to [OPRA] ..., the custodian shall delete or excise from a copy of the record that portion which the custodian asserts is exempt from access and shall promptly permit access to the remainder of the record.” N.J.S.A. 47:1A-5.g.

OPRA further states that:

“[u]nless a shorter time period is otherwise provided by statute, regulation, or executive order, a custodian of a government record shall grant access to a government record or deny a request for access to a government record *as soon as possible, but not later than seven business days after receiving the request*, provided that the record is currently available and not in storage or archived.

...

The requestor shall be advised by the custodian when the record can be made available. If the record is not made available by that time, access shall be deemed denied.” (Emphasis added). N.J.S.A. 47:1A-5.i.

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.

The Open Public Meetings Act states in pertinent part that:

“[a] public body may exclude the public only from that portion of a meeting at which the public body discusses:

...

[a]ny material the disclosure of which constitutes an unwarranted invasion of individual privacy such as any records, data, reports, recommendations, or other personal material of any educational, training, social service, medical, health, custodial, child protection, rehabilitation, legal defense, welfare, housing, relocation, insurance and similar program or institution operated by a public body pertaining to any specific individual admitted to or served by such institution or program, including but not limited to information relative to the individual's personal and family circumstances, and any material pertaining to admission, discharge, treatment, progress or condition of any individual, unless the individual concerned (or, in the case of a minor or incompetent, his guardian) shall request in writing that the same be disclosed publicly.” N.J.S.A. 10:4-12(b)(3).

OPRA mandates that a custodian must either grant or deny access to requested records within seven (7) business days from receipt of said request. N.J.S.A. 47:1A-5.i. As also prescribed under N.J.S.A. 47:1A-5.i, a custodian's failure to respond within the required seven (7) business days results in a “deemed” denial. Further, a custodian's response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5.g.⁸ Thus, a custodian's failure to respond in writing to a complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i, and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).

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 the matter now before the Council, the Complainant submitted a request on July 9, 2008, seeking copies of resolutions or motions as required by N.J.S.A. 10:4-13 that authorized the exclusion of the public from closed or executive session meetings held by the Board of the Fire District between June 1, 2006 and date of the request, as well as the minutes of those meetings. The Custodian responded in writing on the seventh (7th) business day after receipt of such request, seeking an additional week to respond to the request. On July 25, 2008, five (5) business days thereafter, the Custodian disclosed some of the requested records and stated that the remainder of the records were not subject to

⁸ It is the GRC's position that a custodian's written response either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, even if said response is not on the agency's official OPRA request form, is a valid response pursuant to OPRA.

disclosure pursuant to N.J.S.A. 10:4-12(b)(3). The Custodian subsequently disclosed the remainder of the records on October 10, 2008 with redactions for matters concerning personnel issues.

The Custodian's July 25, 2008 response occurred within the agreed-upon extension of time for such response and clearly noted the specific records being disclosed, the specific records which were not being disclosed, and the legal authority for the non-disclosure of those records. The Custodian's response apprised the Complainant of the specific records which were not being disclosed and the reason for non-disclosure.

Because the evidence of record indicates that the Custodian sought, in writing, an extension of time to provide a response to the request within the statutorily-mandated seven (7) business day response period, and because the Custodian provided records responsive within the extended response period and provided a legal basis for the non-disclosure of the remainder of the records, the Custodian provided a timely and sufficient response to the Complainant's request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).

In this instant complaint, the Complainant disputes the Custodian's redactions to copies of the requested records which were provided. The Custodian argues that the redactions were necessary to protect privileged attorney client communications, strategy, and matters of ongoing or anticipated litigation.

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 GRC⁹ 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 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:

⁹ Paff v. NJ Department of Labor, Board of Review, GRC Complaint No. 2003-128 (October 2005).
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“[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.”

Therefore, pursuant to Paff, *supra*, the GRC must conduct an *in camera* review of the following requested records to determine the validity of the Custodian’s assertion that the records contain attorney-client privileged information which is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1 and personnel matters exempt from disclosure pursuant to N.J.S.A. 47:1A-10:

- Resolution 06-18
- Resolution 08-01
- Resolution 08-03
- Resolution 08-04
- Resolution 08-08
- Resolution 08-20
- Resolution 08-21
- Special Meeting Minutes dated July 5, 2006
- Meeting minutes dated December 10, 2007
- Executive session meeting minutes dated January 28, 2008
- Executive session meeting minutes dated May 19, 2008
- Executive session meeting minutes dated June 23, 2008

The Council also directs the Custodian to provide a certification that the July 5, 2006 meeting minutes are the official and only version of such minutes in existence, as well as any Resolution or motion authorizing the July 5, 2006 executive session meeting, or a certification that such Resolution or motion does not exist.

The Council therefore defers analysis of whether the Custodian’s response failed to set forth a specific legal basis for the denial of access to the requested records pending the Custodian’s compliance with the Council’s Interim Order.

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.

Whether the Complainant is a “prevailing party” pursuant to N.J.S.A. 47:1A-6 and entitled to reasonable 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. Because the evidence of record indicates that the Custodian sought, in writing, an extension of time to provide a response to the request within the statutorily-mandated seven (7) business day response period, and because the Custodian provided records responsive within the extended response period and provided a legal basis for the non-disclosure of the remainder of the records, the Custodian provided a timely and sufficient response to the Complainant's request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).
2. 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 following requested records to determine the validity of the Custodian's assertion that the records contain attorney-client privileged information which is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1 and personnel matters exempt from disclosure pursuant to N.J.S.A. 47:1A-10:
 - Resolution 06-18
 - Resolution 08-01
 - Resolution 08-03
 - Resolution 08-04
 - Resolution 08-08
 - Resolution 08-20
 - Resolution 08-21
 - Special Meeting Minutes dated July 5, 2006
 - Meeting minutes dated December 10, 2007
 - Executive session meeting minutes dated January 28, 2008
 - Executive session meeting minutes dated May 19, 2008
 - Executive session meeting minutes dated June 23, 2008
3. **The Custodian must deliver¹⁰ to the Council in a sealed envelope nine (9) copies of the requested unredacted documents set forth at paragraph 2 above, a document or redaction index,¹¹ as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,¹² that the documents provided are the documents requested by the Council for the**

¹⁰ 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.

¹¹ The document or redaction index should identify the document and/or each redaction asserted and the lawful basis for the denial.

¹² "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."

***in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**

The Council also directs the Custodian to provide a certification that the July 5, 2006 meeting minutes are the official and only version of such minutes in existence, as well as any Resolution or motion authorizing the July 5, 2006 executive session meeting, or a certification that such Resolution or motion does not exist.

4. The Council defers analysis of whether the Custodian's response failed to set forth a specific legal basis for the denial of access to the requested records pending the Custodian's compliance with the Council's Interim Order.
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: Karyn G. Gordon, Esquire
In House Counsel

Approved By: Catherine Starghill, Esq.
Executive Director

September 23, 2009