



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Commissioner

FINAL DECISION

April 30, 2013 Government Records Council Meeting

Rita Roykovich
Complainant

Complaint No. 2011-258

v.

West Milford Board of Education (Passaic)
Custodian of Record

At the April 30, 2013 public meeting, the Government Records Council (“Council”) considered the April 23, 2013 *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 provided the GRC with a legal certification, the unredacted records requested for the *in camera* inspection and a redaction index on January 10, 2013. Therefore, the Custodian timely complied with the Council’s December 19, 2012 Interim Order.
2. The requested report is exempt from disclosure as advisory, consultative or deliberative material because it contains factual and evaluative information which was relied upon by the Board of Education to determine whether or not to take disciplinary action against staff members involved with the allegations of bullying. See N.J.S.A. 47:1A-1.1, Education Law Ctr. v. N.J. Dept. of Educ., 198 N.J. 274 (2009) and Paff v. Highpoint Regional School Board of Education, Sussex County, Law Division, Docket No. SSX-L-594-12 (December 11, 2012).
3. Here, the Complainant has not achieved the desired result because the complaint did not bring about a change (voluntary or otherwise) in the Custodian’s conduct. Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006). Additionally, no factual causal nexus exists between the Complainant’s filing of a Denial of Access Complaint and the relief ultimately achieved because no relief was ordered by the Council. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Specifically, the records responsive to the Complainant’s requests are exempt pursuant to N.J.S.A. 47:1A-1.1. Therefore, the Complainant is not a prevailing party entitled to an award of a reasonable attorney’s fee pursuant to N.J.S.A. 47:1A-6, Teeters, supra, and Mason, supra.

This is the final administrative determination in this matter. Any further review should be pursued in the Appellate Division of the Superior Court of New Jersey within forty-five (45) days. Information about the appeals process can be obtained from the Appellate Division Clerk’s Office, Hughes Justice Complex, 25 W. Market St., PO Box 006, Trenton, NJ 08625-0006.



Proper service of submissions pursuant to any appeal is to be made to the Council in care of the Executive Director at the State of New Jersey Government Records Council, 101 South Broad Street, PO Box 819, Trenton, NJ 08625-0819.

Final Decision Rendered by the
Government Records Council
On The 30th Day of April, 2013

Robin Berg Tabakin, Esq., Chair
Government Records Council

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

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: May 3, 2013

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

***In Camera* Findings and Recommendations of the Executive Director
April 30, 2013 Council Meeting**

**Rita Roykovich¹
Complainant**

GRC Complaint No. 2011-258

v.

**West Milford Board of Education (Passaic)²
Custodian of Records**

Records Relevant to Complaint: Bullying report (“report”) authored by Dr. Leonard H. Elovitz, Mr. Robert L. Gordon and Mr. Mel Klein concerning R.R. (the Complainant’s minor daughter).³

Request Made: June 27, 2011

Response Made: June 28, 2011

Custodian: Barbara Francisco

GRC Complaint Filed: August 3, 2011⁴

Records Submitted for *In Camera* Examination: Report dated February 2011 authored by Consulting Services Associates (“CSA”).

Background

December 18, 2012

Government Records Council’s Interim Order. At the December 18, 2012 public meeting, the Government Records Council (“Council”) considered the November 20, 2012 Executive Director’s Findings and Recommendations and all related documentation submitted by the parties.⁵ 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 nine (9) page bullying report dated February 2011, authored by CSA in response to the Complainant’s request in order to determine the validity of the

¹ Represented by Jeffrey Youngman, Esq., of Feitlin, Youngman, Karas & Gerson, LLC (Fair Lawn, NJ).

² Represented by Marie-Laurence Fabian, Esq., of Porzio, Bromberg & Newman, P.C. (Morristown, NJ).

³ Dr. Leonard H. Elovitz, Mr. Robert L. Gordon and Mr. Mel Klein represent Consulting Service Associates, an independent firm hired by the Board of Education to investigate the Complainant’s underlying bullying claims.

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

⁵ This complaint was prepared and scheduled for adjudication at the Council’s November 27, 2012 meeting; however, said meeting was cancelled due to a lack of a quorum.

Custodian's assertion that said bullying report contains advisory, consultative and deliberative material pursuant to N.J.S.A. 47:1A-1.1.

2. **The Custodian must deliver⁶ to the Council in a sealed envelope nine (9) copies of the requested unredacted record (see #1 above), a document or redaction index⁷, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,⁸ that the record provided is the record requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**
3. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
4. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

December 19, 2012

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

December 20, 2012

E-mail from Custodian's Counsel to the GRC. Counsel requests an extension of time until January 11, 2013 to comply with the Council's Order.

December 20, 2012

E-mail from the GRC to Custodian's Counsel. The GRC grants an extension until January 11, 2013 to comply with Council's Order.

January 10, 2013

Certification of the Custodian in response to the Order attaching nine (9) copies of the bullying report dated February 2011 authored by CSA. The Custodian certifies that she is employed by the West Milford Board of Education ("Board") as the Business Administrator/Board Secretary. The Custodian also certifies that she is submitting this certification in response to the Council's December 18, 2012 Order. The Custodian further certifies that enclosed with this certification are nine (9) unredacted copies of the "Report of Findings" made by CSA to the Board dated February 2011. The Custodian additionally certifies that this is the report requested by the GRC for an *in camera* review.

The Custodian argues that the record responsive is a consultative and advisory report commissioned by and provided to the Board regarding how Board personnel

⁶ The *in camera* records 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.

⁷ The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

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

handled an alleged bullying matter. The Custodian also argues that the report contains confidential evaluations of Board personnel that were relied upon by then Interim Superintendent John Petrelli in making recommendations to the Board about whether any disciplinary action needed to be taken against district personnel. The Custodian certifies that the records were denied pursuant to N.J.S.A. 47:1A-1.1 as advisory, consultative and deliberative (“ACD”) material.

February 1, 2013

E-mail from the GRC to Complainant’s Counsel and Custodian’s Counsel. The GRC states that this complaint was scheduled for the Council’s January 29, 2013 meeting; however, the Council decided that before this matter could be adjudicated, the following issues must be addressed.

1. Does the implication of minors in this issue change any analysis regarding the disclosability of the report?
2. If the bullying report is disclosed, what, if any, chilling effect will the disclosability have on future bullying incidents?
3. Is a copy of this report included with the student’s file?
4. Can the factual components of this report, if any, be severed from the report as a whole? Can this report be disclosed with redactions?
5. If there are any privacy issues regarding this report, please complete the attached balancing test established by the New Jersey Supreme Court in Doe v. Poritz, 142 N.J. 1 (1995).

February 15, 2013

Complainant Counsel’s response to the GRC’s e-mail dated February 1, 2013. Counsel provides the following answers to the questions:

Does the implication of minors in this issue change any analysis regarding the disclosability of the bullying report?

Counsel states that no minors may be implicated in the report sought by the Complainant and should in no way serve to affect the Council’s determination with regard to the report. Counsel also states that no exception regarding the identity of minors is contained in N.J.S.A. 47:1A-1, nor in any other statute, rule or regulation. Counsel further states that oftentimes the initials of minors may be utilized instead of their full names in appropriate filings or written decisions of the Courts; however, the privacy interests of minors are generally only protected in cases involving allegations of sexual, physical or psychological abuse and serious neglect. Counsel argues that the underlying matter does not involve issues related to allegations of sexual, physical or psychological abuse and serious neglect. Counsel also argues that the information sought by the Complainant is sought on behalf of R.R., through her mother. Counsel further argues that the Complainant has clearly waived any purported privacy defense by affirmatively seeking the requested report.

Counsel states that in order to alleviate any concerns which the Council may have with regard to privacy issues, it should be noted that the Complainant would consent to

the redaction of the involved minors' names, with the exception of R.R.'s name, whose names may be reflected by initials rather than full names.

If the bullying report is disclosed, what, if any, chilling effect will the disclosability have on future bullying incidents?

Counsel states that disclosure of such report will have no effect on future bullying incidents and will serve to further the purposes of the harassment, intimidation and bullying ("HIB") statute. *See N.J.S.A. 18A:37-13, et. seq.* Counsel argues that OPRA does not contain any exclusion regarding the disclosure of public records based upon a claim that it will have a "chilling effect" on any other statute including the HIB statute. Counsel also argues that the Legislature's intent behind the HIB statute was for the public, including, students, parents, teachers, principals and other school staff, to be educated and informed regarding clearer standards related to harassment, intimidation and bullying and that reporting, investigating and responding to incidents of harassment, intimidation and bullying would promote such intent. Counsel argues that contrary to the Board's claim that this information must remain confidential, the Legislature has clearly determined that such information must be made public in order to promote and further the aim of the HIB statute. Counsel also argues that all limitations on the right of access shall be construed in favor of the public's right to access.

Counsel states that the Complainant must argue her case in a vacuum as she has not seen, nor been advised, concerning any aspect of the report. Counsel argues that it strains credulity for the Board to argue that the Complainant's family merely participated in this investigation in a magnanimous effort to promote future school safety rather than to protect the Complainant's daughter. Counsel also argues that the Complainant was of the mind-set that they would be provided with the results of the investigation, including the report itself. Counsel further argues that the Board's failure to produce this report would have a chilling effect on families' willingness to cooperate with the Board's concerning incidents involving allegations of harassment, intimidation and bullying.

Counsel states that this could be an educational moment. Counsel argues that it is the intention of the Legislature to strengthen the standards and procedures for preventing, reporting and investigating acts of harassment, intimidation and bullying. Counsel also states that although the Complainant has not seen the report, the production of the report will 1) serve to strengthen the public's belief concerning a school administration's ability to investigate and handle issues of harassment, intimidation and bullying or 2) cause parents and the public at large, to demand that standards mandated by the Legislature be stringently enforced.

Is a copy of this report included with the student's file?

Counsel states that he is unaware if the report is included with the student's file. Counsel also states that if the report is located in R.R.'s file, then the Complainant demands that the Board produce R.R.'s entire student file.

Can the factual components of this report, if any, be severed from the report as a whole?
Can this report be disclosed with redactions?

Counsel states that there can be no plausible argument that the “factual components” of the report can be withheld. Counsel also states that the Board’s only argument regarding the confidentiality of the report is that those sections contain ACD. Counsel argues that facts are facts and thus must be disclosed under any circumstances.

Counsel states that in order to qualify for the deliberative process privilege, records must meet two (2) requirements: 1) it was created before any decisions were made by the public entity and 2) the document contains “opinions, recommendations or advice regarding policies or decisions” Education Law Ctr. v. N.J. Dept. of Educ., 198 N.J. 274, 282 (2009). Counsel argues that the Board cannot satisfy the first (1st) criteria because there has been no argument that any policy was under consideration at the time of the rendering of the report. Counsel also argues that any decision as to how to respond to the purported acts of harassment, intimidation and bullying had clearly already been rendered by the time CSA was retained. Counsel further argues that the Board should not be permitted to hide behind the deliberative process privilege as the basis for refusing to produce the report.

Counsel argues that the report should be provided without redaction. Counsel also argues that even if it is determined that the report need be redacted, same must be produced with those redactions. Counsel further argues only those portions which are ACD are subject to redaction. Lastly, Counsel argues that the balance is neither protected nor privileged and must be produced.

If there are any privacy issues regarding this report, please complete the attached balancing test established by the New Jersey Supreme Court in Doe v. Poritz, 142 N.J. 1 (1995).

Counsel argues that the only right to privacy which could potentially be asserted is that of R.R.. Counsel also argues that this is a non-issue because R.R. is seeking the information through her mother. Counsel further argues that the other minors mentioned in the report, if they are mentioned, have no right to privacy as the report does not contain allegations of sexual, physical or psychological abuse, and serious neglect. Counsel states that regardless, the Complainant has already agreed that the names of other minors may be reduced to initials.

February 15, 2013

Custodian Counsel’s response to the GRC’s e-mail dated February 1, 2013. Counsel provides the following answers to the questions:

Does the implication of minors in this issue change any analysis regarding the disclosability of the bullying report?

Counsel states that there is no implication of minors because the report refers to all minors by their initials only.

If the bullying report is disclosed, what, if any, chilling effect will the disclosability have on future bullying incidents?

Counsel states that all allegations of bullying are now investigated pursuant to the requirements of the Anti-Bullying Bill of Rights Act, which became effective at the start of the 2011-2012 school year, after the underlying issues listed in the report. Counsel also states that CSA was retained to investigate the performance of district personnel who were accused by the Complainant of mishandling allegations of bullying made during the 2010-2011 school year. Counsel further states that the Interim Superintendent relied upon this report in evaluating the performance of the staff members involved and in making recommendations to the Board regarding whether disciplinary action should be taken. Counsel argues that disclosure of this report would have a chilling effect on the Board's ability to rely on confidential ACD material when engaging in self-evaluation and decision-making. Counsel also argues that release of this report will discourage it from undertaking future investigations of this nature.

Is a copy of this report included with the student's file?

Counsel states that a copy of this report is not included with the student's file.

Can the factual components of this report, if any, be severed from the report as a whole?
Can this report be disclosed with redactions?

Counsel states that the report contains both factual and evaluative findings. Counsel also states that all these findings address the alleged mishandling of the underlying situation by staff members who were the subject of the investigation by CSA and were relied upon by the Interim Superintendent when making personnel decisions.

If there are any privacy issues regarding this report, please complete the attached balancing test established by the New Jersey Supreme Court in Doe v. Poritz, 142 N.J. 1 (1995).

Counsel asserts that there are privacy issues regarding the report and provides the answers to the following questions:

1. The type of record requested.

Counsel states that this record is an ACD report that was commissioned by the Board to investigate the alleged mishandling by district personnel of an alleged bullying situation and upon which the Interim Superintendent and Board relied prior to making personnel decisions.

2. The information the requested records do or might contain.

Counsel states that the private information contained in the report is the confidential evaluation of the performance of the staff members who were the subject of the investigation by CSA.

3. The potential harm in any subsequent non-consensual disclosure of the requested records.

Counsel states that there is significant potential harm to the privacy interests of the staff members who were the subject of the investigation by CSA because the information contained in the report is confidential and exceeds the very limited personnel information that a citizen is entitled to receive under OPRA.

4. The injury from disclosure to the relationship in which the requested record was generated.

Counsel states that this report was generated in February 2011 upon recommendation of the Interim Superintendent for a confidential investigation of allegations of wrongdoing by various staff members in relation to an alleged bullying incident that took place in the prior school year. Counsel also states that the purpose of the investigation was to provide guidance to the Interim Superintendent and the Board regarding whether any staff members had engaged in any wrongdoing or mishandled the situation that had been presented to them. Counsel argues that as the law provides staff members with a reasonable expectation of privacy in their personnel matters. Counsel also argues that release of the report would negatively impact the relationship between the Board and the staff members involved.

Counsel argues that pursuant to *N.J.A.C. 6A:32-4.9*, absent some very limited basic information, a personnel file is strictly confidential. Counsel also argues that public discussion of personnel matters is strictly limited by law that makes clear that a Board may not discuss personnel matters in open session at a public meeting unless the employee has been notified of the need for such a discussion and has specifically requested that the discussion take place in public. Counsel further argues that disclosure of the report would invade the staff members' fundamental right to privacy and interfere with the relationship between the Board and its employees.

5. The adequacy of safeguards to prevent unauthorized disclosure.

Counsel states that if the Council orders disclosure of the requested report, there are no adequate safeguards to prevent the Complainant from the unauthorized disclosure of the report to others. Counsel also states that pursuant to OPRA neither ACD records nor personnel records are considered government records and therefore, should not be made available for public access. Counsel further states that non-disclosure of the record is the only way to provide an adequate safeguard to prevent the unauthorized disclosure of this record.

6. Whether there is an express statutory mandate, articulated public policy or other recognized public interest militating toward access.

Counsel states that unlike the examples set forth in *Doe, supra*, including the strong public interest in protecting the public against "the danger of recidivism posed by sex offenders," there is no recognized public policy or interest that militates toward public access to the report in this matter. Counsel argues that the report contains private information only and providing access to it will not protect the public in anyway.

Counsel argues that that the requested report is not a public record based on the recent holding in Paff v. Highpoint Regional School Board of Education, Sussex County, Law Division, Docket No. SSX-L-594-12 (December 11, 2012)⁹. Counsel states that in Paff, *supra*, the Law Division affirmed the denial of the plaintiff's OPRA and common law requests for a similar report.¹⁰ Counsel argues that similar to the report in the present case, the Highpoint Board had retained an outside firm to conduct an investigation of certain allegations regarding the Superintendent of Schools. Counsel also states that the Law Division held that since the report was "produced in response to a direct request by the board...for the sole purpose of informing the board's decision as to whether any administrative or disciplinary actions were necessary in response to the allegations...utilized by the board prior to its determination...and contains professional opinion by [the investigative firm] detailing the veracity, or lack thereof, of the allegations" made said report falls within the deliberative process privilege *Id.* at 10.

Counsel states that the Law Division also held that disclosure of the report "could negatively impact those individuals who cooperated in the investigation with the exception that their identities would not be disclosed and the release of the Report could have a chilling effect on the Board and discourage it from undertaking future investigations." *Id.* at 12. Counsel argues that the purpose of the report, subject to this denial of access complaint, was to advise the Board as it evaluated whether or not its employees performed appropriately and thus falls squarely into the ACD exemption. Counsel further argues that, as such, the Custodian was not obligated to provide said report to the Complainant pursuant to an OPRA request.

Lastly, Counsel argues that since the report also evaluates how various Board employees handled the underlying bullying matter that CSA was retained to review, said report should also be exempt from disclosure as a personnel record pursuant to N.J.S.A. 47:1A-10.

Analysis

Whether the Custodian complied with the Council's December 18, 2012 Interim Order?

At its December 18, 2012 public meeting, the Council determined that because the Custodian asserted that the requested report was lawfully denied because such report contained ACD material pursuant to N.J.S.A. 47:1A-1.1, the Council must determine whether the legal conclusion asserted by the Custodian is properly applied to the report at issue pursuant to Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005). Therefore, the GRC ordered an *in camera* review of the requested report to determine the validity of the Custodian's assertion that the requested report was properly denied.

⁹ Counsel provides a copy of this decision along with her submission.

¹⁰ In Paff, *supra*, the Board of Education hired Check-M-Out Security Services and Investigations, LLC ("Check-M-Out") to conduct an investigation of certain allegations concerning the Superintendent's conduct around students. The plaintiff requested the final investigative report authored by Check-M-Out. Rita Roykovich v. West Milford Board of Education (Passaic), 2011-258 – *In Camera* Findings and Recommendations of the Executive Director

The Council ordered the Custodian to deliver to the Council in a sealed envelope nine (9) copies of the requested unredacted record, 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 record provided is the record 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 January 4, 2013.¹¹ However, Custodian's Counsel requested and was granted an extension until January 11, 2013, to comply with the Council's Order.

On January 19, 2013, the Custodian provided the GRC with a legal certification, the unredacted records requested for the *in camera* inspection, and a redaction index. Therefore, the Custodian timely complied with the Council's December 19, 2012 Interim Order.

Whether the Custodian unlawfully denied the Complainant 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.

OPRA further provides that:

"Government record" or "record" means 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 in the course of his or its official business by any officer, commission, agency or authority of the State or of any political subdivision thereof, including subordinate boards thereof, or that has been received in the course of his or its official business by any such officer, commission, agency, or authority of the State or of any political subdivision thereof, including subordinate boards thereof. *The terms shall not include inter-agency or intra-agency advisory, consultative, or deliberative material.*" N.J.S.A. 47:1A-1.1 (Emphasis added).

The Custodian argued that the nine (9) page bullying report responsive to the request and submitted for an *in camera* review contains ACD material because said report contains confidential evaluations of Board personnel that were relied upon by Interim Superintendent John Petrelli in making recommendations to the Board about whether any disciplinary actions needed to be taken. Conversely, Complainant's Counsel argued in a letter to the GRC dated November 21, 2011, that this report was not created

¹¹ The West Milford Board of Education was closed for the Christmas break from December 24, 2012 through January 1, 2013.
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solely to advise the Board whether or not its employees performed appropriately, and much of the report contains factual information. Counsel also argued that if the report contains both deliberative and factual material, the deliberative material must be redacted and the factual material must be disclosed.

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.

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.*
- (2) Please note that if an *in camera* inspection were conducted by the courts, the process would include the following:

Once it has been determined that a record is deliberative, there is a presumption against disclosure and the party seeking the document has the burden of establishing his or her compelling or substantial need for the record.

- a. That burden can be met by a showing of:
 - i. the importance of the information to the requesting party,
 - ii. its availability from other sources **and**
 - iii. the effect of disclosure on frank and independent discussion of contemplated government policies.

In Education Law Ctr. v. N.J. Dept. of Educ., 198 N.J. 274 (2009), the Education Law Center (“ELC”), as representative of pupils in the State's poorest school districts, challenged in litigation with the Department of Education (“DOE”) its revised state funding formula for public education. *Id.* at 279. In that connection, ELC filed a document request pursuant to OPRA seeking records "related to the ... estimate, review and/or analyses of the cost of providing a thorough and efficient education undertaken by the Office of School Funding." *Id.* at 281. Although many documents were produced in response to the request, the DOE sought to withhold, on the basis of OPRA's deliberative process exemption and under a balancing of interests based on common law right of access principles, a single memorandum prepared by it that outlined state aid simulation results for three school funding formula structures. *Id.* at 279-80. Its refusal to produce the document raised the issue, novel in New Jersey, of "how to determine precisely when material is 'deliberative,' in those instances involving statistical and like data that have factual components, but may project opinions or expose an agency's deliberations or reasoning process." *Id.* at 288.

In determining whether the document at issue was "deliberative," the Court declined to adopt a "fact" versus "opinion" dichotomy, stating that "a court must recognize the difference between factual material that is part of the formulation, or exercise, of policy-oriented judgment from factual material that is not." *Id.* at 294-95.

Adopting the rationale of the D.C. Circuit in Mapother v. Dep't of Justice, 3 F.3d 1533, 1539, 303 U.S. App. D.C. 249 (D.C. Cir. 1993), the Court held: "Because of 'the need for deliberation to inform discretion and for confidentiality to protect deliberation,' ... we are convinced that the key to identifying deliberative material must be how closely the material (including the selection of 'factual' or 'informational' material) relates to the 'formulation or exercise of . . . policy-oriented judgment or [to] the process by which policy is formulated.'" Education Law Center, *supra*, 198 N.J. 274. The Court stated: "[T]he question of what is protected under the deliberative process privilege, incorporated into OPRA as an exemption from the definition of a 'government document,' must depend, first, on whether the information sought is a part of the process leading to formulation of an agency's decision, (not on a simplistic label of "fact" or "opinion,"), and, second, on the material's ability to reflect or to expose the deliberative aspects of that process." *[Ibid.]*

In adopting that standard, the Court recognized "the importance of promoting government's full and frank discussion of ideas when developing new policies, or in examining existing policies and procedures" and it further recognized that "such activities constitute a process of policy examination and evaluation." *Ibid.*

Accordingly, the Court held that: "[a] record, which contains or involves factual components, is entitled to deliberative-process protection when it was used in the decision-making process and its disclosure would reveal deliberations that occurred during that process." *Id.* at 280. Examining the memorandum at issue, the Court observed that data set forth in it was "manipulated to provide organized information useful to the DOE, specifically for the purpose of aiding the agency in deciding on an aspect of a new funding scheme" and it was created as part of the deliberative process and was reflective of the DOE's deliberations. *Id.* at 301. The Court thus found the memorandum to be protected. *Id.* at 301-02.

In Paff v. Highpoint Regional School Board of Education, Sussex County, Law Division, Docket No. SSX-L-594-12 (December 11, 2012) the NJ Superior Court, Law Division reviewed a report authored by Check-M-Out Security Services and Investigations, LLC ("Check-M-Out"). The Highpoint Board of Education hired Check-M-Out to conduct an investigation of allegations regarding the Superintendent's conduct around students. Check-M-Out services provided a final investigative report directly to the Board's law firm and said report was distributed among the Board members. The plaintiff filed an OPRA request with Highpoint Board seeking a copy of Check-M-Out's final investigative report.

The Highpoint Board argued that the requested report was exempt from disclosure as ACD. The plaintiff argued that the report is not subject to the ACD exemption because it is not a record of the Board's deliberations. The Highpoint Board also argued that "1) the report was generated to inform the Board of a decision regarding [the Superintendent's] employment and 2) the report contains opinions and facts incontrovertibly germane to the Board's decision making process."

The Law Division held that the report was exempt from disclosure as ACD. The court held that the report was exempt because "[the report] 1) was generated by Check-

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M-Out in response to a direct request by the board; 2) was produced for the sole purpose of informing the Board’s decision as to whether any administrative or disciplinary actions were necessary in response to the allegations regarding [the Superintendent]; 3) was utilized by the Board’s determination that no action was necessary and 4) contains a professional opinion by Check-M-Out detailing the veracity, or lack thereof, of the allegations regarding [the Superintendent’s] conduct.” The court further held that since the report was part of the deliberative process regarding the Superintendent’s conduct, said report is exempt from disclosure on that basis.

The GRC conducted an *in camera* examination on the submitted record. 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> Examination¹²
Nine (9) page bullying report authored by CSA	February 2011	Bullying report denied in its entirety	Bullying report is exempt from disclosure as advisory, consultative or deliberative material pursuant to <u>N.J.S.A. 47:1A-1.1</u> .	Said report contains factual information which was used in CSA’s evaluations and opinions regarding Board personnel and thus is considered ACD and exempt from disclosure pursuant to <u>N.J.S.A. 47:1A-1.1</u> . See <u>Education Law Center, supra</u> and <u>Paff, supra</u> .

Here, the report requested is similar to the report requested in Paff, supra. In the instant complaint the BOE retained CSA to investigate the performance of district personnel of mishandling allegations of bullying made during the 2010-2011 school year.

¹² **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.

CSA authored a report which was relied upon by the Interim Superintendent when evaluating the involved staff members and making recommendations to the BOE regarding whether disciplinary action should be taken against them. Further, Custodian's Counsel argues that release of this report would discourage the BOE from undertaking investigations of this nature in the future.

Therefore, the requested report is exempt from disclosure as advisory, consultative or deliberative material because it contains factual and evaluative information which was relied upon by the BOE to determine whether or not to take disciplinary action against staff members involved with the allegations of bullying. See N.J.S.A. 47:1A-1.1, Education Law Center, *supra* and Paff, *supra*.

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.*

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 Supreme 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)). In Buckhannon, the Supreme Court stated that the phrase “prevailing party” is a legal term of art that refers to a “party in whose favor a judgment is rendered.” (quoting Black’s Law Dictionary 1145 (7th ed. 1999)). The Supreme Court rejected the catalyst theory as a basis for prevailing party attorney fees, in part because “[i]t allows an award where there is no judicially sanctioned change in the legal relationship of the parties.” *Id.* at 605, 121

S. Ct. at 1840, 149 L. Ed. 2d at 863, but also over concern that the catalyst theory would spawn extra litigation over attorney's fees. *Id.* at 609, 121 S. Ct. at 1843, 149 L. Ed. 2d at 866.

However, the Court noted in Mason, *supra*, that Buckhannon is binding only when counsel fee provisions under federal statutes are at issue. 196 N.J. at 72, *citing Teeters*, *supra*, 387 N.J. Super. at 429; *see, e.g., Baer v. Klagholz*, 346 N.J. Super. 79 (App. Div. 2001) (applying Buckhannon to the federal Individuals with Disabilities Education Act), *certif. denied*, 174 N.J. 193 (2002). “But in interpreting New Jersey law, we look to state law precedent and the specific state statute before us. When appropriate, we depart from the reasoning of federal cases that interpret comparable federal statutes.” 196 N.J. at 73 (citations omitted).

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

“OPRA itself contains broader language on attorney's fees than the former RTKL did. OPRA provides that ‘[a] requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee.’ N.J.S.A. 47:1A-6. Under the prior RTKL, ‘[a] plaintiff in whose favor such an order [requiring access to public records] issues ... may be awarded a reasonable attorney's fee not to exceed \$500.00.’ N.J.S.A. 47:1A-4 (repealed 2002). The Legislature's revisions therefore: (1) mandate, rather than permit, an award of attorney's fees to a **prevailing party**; and (2) eliminate the \$500 cap on fees and permit a reasonable, and quite likely higher, fee award. Those changes expand counsel fee awards under OPRA.” (Footnote omitted.) Mason at 73-76 (2008).

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 instant complaint, as in Mason, the Complainant’s Denial of Access Complaint was not the catalyst for the release of the requested records, because the report responsive is exempt from disclosure as ACD pursuant to N.J.S.A. 47:1A-1.1.

Here, the Complainant has not achieved the desired result because the complaint did not bring about a change (voluntary or otherwise) in the Custodian’s conduct. Teeters, *supra*. Additionally, no factual causal nexus exists between the Complainant’s filing of a Denial of Access Complaint and the relief ultimately achieved because no relief was ordered by the Council. Mason, *supra*. Specifically, the records responsive to the Complainant’s requests are exempt pursuant to N.J.S.A. 47:1A-1.1 Therefore, the Complainant is not a prevailing party entitled to an award of a reasonable attorney’s fee pursuant to N.J.S.A. 47:1A-6, Teeters, *supra*, and Mason, *supra*.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian provided the GRC with a legal certification, the unredacted records requested for the *in camera* inspection and a redaction index on January 10, 2013. Therefore, the Custodian timely complied with the Council's December 19, 2012 Interim Order.
2. The requested report is exempt from disclosure as advisory, consultative or deliberative material because it contains factual and evaluative information which was relied upon by the Board of Education to determine whether or not to take disciplinary action against staff members involved with the allegations of bullying. See N.J.S.A. 47:1A-1.1, Education Law Ctr. v. N.J. Dept. of Educ., 198 N.J. 274 (2009) and Paff v. Highpoint Regional School Board of Education, Sussex County, Law Division, Docket No. SSX-L-594-12 (December 11, 2012).
3. Here, the Complainant has not achieved the desired result because the complaint did not bring about a change (voluntary or otherwise) in the Custodian's conduct. Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006). Additionally, no factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved because no relief was ordered by the Council. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Specifically, the records responsive to the Complainant's requests are exempt pursuant to N.J.S.A. 47:1A-1.1. Therefore, the Complainant is not a prevailing party entitled to an award of a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6, Teeters, supra, and Mason, supra.

Prepared By: Harlynn A. Lack, Esq.
Case Manager

Approved By: Brandon D. Minde, Esq.
Executive Director

April 23, 2013



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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TRENTON, NJ 08625-0819

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Commissioner

INTERIM ORDER

December 18, 2012 Government Records Council Meeting

Rita Roykovich
Complainant

Complaint No. 2011-258

v.

West Milford Board of Education (Passaic)
Custodian of Record

At the December 18, 2012 public meeting, the Government Records Council ("Council") considered the November 20, 2012 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 nine (9) page bullying report dated February 2011, authored by CSA in response to the Complainant's request in order to determine the validity of the Custodian's assertion that said bullying report contains advisory, consultative and deliberative material pursuant to N.J.S.A. 47:1A-1.1.
2. **The Custodian must deliver¹ to the Council in a sealed envelope nine (9) copies of the requested unredacted record (see #1 above), a document or redaction index², as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,³ that the record provided is the record requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**
3. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
4. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

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

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

³ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

Interim Order Rendered by the
Government Records Council
On The 18th Day of December, 2012

Robin Berg Tabakin, Chair
Government Records Council

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

Denise Parkinson Vetti, Secretary
Government Records Council

Decision Distribution Date: December 19, 2012

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
December 18, 2012 Council Meeting**

**Rita Roykovich¹
Complainant**

GRC Complaint No. 2011-258

v.

**West Milford Board of Education (Passaic)²
Custodian of Records**

Records Relevant to Complaint: Bullying report authored by Dr. Leonard H. Elovitz, Mr. Robert L. Gordon and Mr. Mel Klein concerning R.R., (the Complainant's minor daughter).³

Request Made: June 27, 2011

Response Made: June 28, 2011

Custodian: Barbara Francisco

GRC Complaint Filed: August 3, 2011⁴

Background

June 27, 2011

Complainant's Open Public Records Act ("OPRA") request. The Complainant requests the records relevant to this complaint listed above on an official OPRA request form. The Complainant indicates that she wishes to conduct an on-site inspection and have copies of the requested report.

June 28, 2011

Custodian's response to the OPRA request. The Custodian responds in writing on the OPRA request form to the Complainant's request, the first (1st) business day following receipt of such request. The Custodian states that access to the requested report is denied because the responsive report is advisory to the Board of Education ("BOE") and not a public record.

August 3, 2011

Denial of Access Complaint filed with the Government Records Council ("GRC") with no attachments.

¹ Represented by Jeffrey Youngman, Esq., of Feitlin, Youngman, Karas & Gerson, LLC (Fair Lawn, NJ).

² Represented by Marie-Laurence Fabian, Esq., of Porzio, Bromberg & Newman, P.C. (Morristown, NJ).

³ Dr. Leonard H. Elovitz, Mr. Robert L. Gordon and Mr. Mel Klein represent Consulting Service Associates, an independent firm hired by the Board of Education to investigate the Complainant's underlying bullying claims.

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

The Complainant states that her daughter R.R. was being harassed and bullied by other students at West Milford High School. The Complainant also states that after numerous bullying complaints to the BOE, the BOE hired three (3) investigators to investigate all claims and allegations and to provide recommendations for all parties involved as to what changes the staff needed, to answer the question of why the policy and procedures in place were not being followed and what was in R.R.'s best interest.

The Complainant states that these investigators were hired at the January 25, 2011 BOE meeting. The Complainant also states that the report was finalized in February 2011. The Complainant further states that the investigators informed her that she was entitled to a copy of this report under the Family Education Rights and Privacy Act ("FERPA") and OPRA. The Complainant asserts that she is entitled to any and all information pertaining to her daughter's health, well-being, physical and emotional safety and academic achievement. The Complainant also asserts that any and all documentation pertaining to her daughter should be made available.

The Complainant states she filed an OPRA request for this report on June 27, 2011. The Complainant states that the Custodian denied her access to this report on June 28, 2011, stating that the report is advisory and not a public record.⁵

The Complainant does not indicate whether she wants to mediate this complaint.

August 5, 2011

Offer of Mediation sent to both parties.

August 10, 2011

The Complainant agrees to mediate this complaint.

August 19, 2011

The Custodian agrees to mediate this complaint.

August 22, 2011

Complaint is referred to mediation

November 1, 2011

Complaint is referred back from mediation to the GRC for adjudication.

November 4, 2011

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

November 9, 2011

Custodian's SOI with the following attachments:

- Complainant's OPRA request dated June 27, 2011
- Custodian's response to the Complainant's OPRA request dated June 28, 2011.

⁵ The Complainant makes additional arguments regarding the underlying matter of R.R. being bullied. However, said arguments are not relevant to the adjudication of this complaint.

The Custodian certifies that the report responsive to the Complainant's request must be permanently maintained in accordance with the Records Destruction Schedule established and approved by Records Management Services.⁶

The Custodian certifies that she received the Complainant's OPRA request on June 27, 2011. The Custodian also certifies that she responded to the Complainant's request on June 28, 2011 and denied the Complainant access to the report responsive because said report was advisory to the BOE.

The Custodian certifies that there is a nine (9) page report dated February 2011, authored by Consulting Services Associates ("CSA") in response to the Complainant's request. The Custodian argues that this report is consultative and advisory to the BOE because it pertains to how the BOE personnel handled an alleged bullying matter. The Custodian certifies that this report contains confidential evaluations of BOE personnel.

John Petrelli ("Mr. Petrelli"), former Interim Superintendent, certifies that during the 2010-2011 school year, the Complainant made several complaints to the BOE that R.R. had been bullied and harassed during the 2009-2010 school year and continued to be bullied and harassed during the 2010-2011 school year. Mr. Petrelli also certifies that the Complainant complained bitterly and vociferously that she and R.R. had been ignored and retaliated against by the administration at the West Milford High School and that the administration had not addressed her complaints. Mr. Petrelli further certifies that in December 2010, he recommended to the BOE that it retain CSA in light of the Complainant's complaints regarding the alleged inaction of district personnel.

Mr. Petrelli certifies that CSA was retained by the BOE to conduct a review into how the district's personnel had handled the matter consistent with its own policies and procedures. Mr. Petrelli also certifies that CSA interviewed the Complainant, R.R. and various staff members who were involved in the matter and prepared an advisory report for the BOE. Mr. Petrelli further certifies that he relied upon CSA's report in evaluating the staff members' performance and in making recommendations to the BOE regarding whether disciplinary action should be taken against the staff.

Custodian's Counsel states that the purpose of CSA's report was to advise the BOE whether its employees performed appropriately regarding addressing the Complainant's underlying bullying complaints. Counsel argues that this report falls squarely into the category of advisory, consultative or deliberative ("ACD") material. Counsel also argues that since this report is ACD, the Custodian was not obligated to provide it to the Complainant pursuant to OPRA. Counsel further argues that records used in the deliberative process of public entities are not subject to public scrutiny and thus are privileged. *See Education Law Center v. NJ Department of Education*, 198 N.J. 274 (2009). Counsel additionally argues that the creation of this privilege was based on the premise that "free and uninhibited communication" amongst public officials promotes candor during the decision making process. *Id.* at 286-287. Counsel argues that a

⁶ The Custodian did not certify to the search undertaken to locate the records responsive as is required pursuant to *Paff v. NJ Department of Labor*, 392 N.J. Super. 334 (App. Div. 2007). Rita Roykovich v. West Milford Board of Education (Passaic), 2011-258 – Findings and Recommendations of the Executive Director 3

document is included in the deliberative process if 1) it was created before any decisions were made by the public entity and 2) the document contains opinions, recommendations or advice regarding policies or decisions. *Id.* at 287. Counsel states that disclosure of this report would give insight into how the BOE used this report to formulate its decisions regarding employees.

Counsel also argues that with the exception of certain basic information, such as an employee's name, title, position, salary, and length of service, personnel records "... shall not be considered a government record and shall not be made available for public access." N.J.S.A. 47:1A-10. Counsel states that this report contains evaluative statements regarding how various BOE employees handled the underlying bullying complaints that CSA was retained to review, thus it falls under the category of personnel records.

November 21, 2011

Letter from Complainant's Counsel to the GRC. Counsel states that for nearly two (2) years R.R. was harassed, intimidated and bullied. Counsel also states that the Complainant often complained to the school administrators in an attempt to have the school district respond appropriately. Counsel further states that nothing was done to make R.R. feel safe in her high school. Counsel additionally states that Mr. Petrelli informed the Complainant that an independent firm would conduct an investigation regarding the Complainant's allegations. Counsel states that the BOE hired CSA to conduct an independent investigation regarding the Complainant's allegations of severe and pervasive bullying within the high school, as well as allegations that the administration failed to address or remedy the situation.

Counsel argues that pursuant to N.J.S.A. 47:1A-1.1 the term government record does not include "inter-agency or intra-agency advisory, consultative or deliberative material." *Id.* Counsel also argues that the Complainant in this matter is seeking material that includes more information than conclusions or recommendations made to the BOE by CSA in a report dated February 2011. Counsel states "... government records shall be readily accessible for inspection, copying or examination by the citizens of this State with certain exceptions ... for the protection of the public interest, and limitations on the right of access ... shall be construed in the favor of the public's right of access." (Emphasis added). N.J.S.A. 47:1A-1.1. Counsel argues that this report was not solely to advise the BOE whether or not its employees performed appropriately and upon belief and understanding, much of the information contained therein is factual in nature. Counsel also argues that this report does not fall under the ACD exception exemption and thus the Custodian should disclose this report either in its entirety or with redactions to the Complainant.

Counsel argues that some information contained in this report might be ACD; however, this report could also be lawfully redacted for opinions or evaluations. Counsel also argues that for the deliberative process to apply, a record must meet two (2) requirements; "1) it must have been generated before the adoption of an agency's policy or decision and 2) it must be deliberative in nature containing opinions, recommendations or advice about agency policies" Gannett New Jersey Partners, LP v. County of Middlesex, 379 N.J. Super. 205 (App. Div. 2005). Counsel states that there were no BOE

policies under consideration at the time of the investigation was ordered or when the report was created. Counsel also states that she does not believe that any BOE policies were newly adopted or updated in response to the issuing of the report.

Counsel argues that if a record contains both deliberative and factual material, the deliberative materials must be redacted and the factual material disclosed. Counsel also argues that purely factual material that does not reflect deliberative processes is not protected. *See Gannett* at 84-85. Counsel states that the Custodian has not successfully argued that the report was used in the deliberative process because the Custodian did not articulate which policy or procedure was evaluated by CSA. Counsel states that the Custodian also argued that CSA's involvement was to conduct a review of how the district's personnel handled the matter consistent with its own policies and procedures. Counsel also states that this report was created before any consideration of disciplinary decisions. Counsel asserts that release of this report would not give insight into how the BOE utilized this record to formulate its decisions regarding its employees because CSA themselves stated that this investigation was for the sole purpose to help R.R.

Counsel argues that contrary to Custodian's arguments, this report is not a personnel record and thus not exempt from disclosure pursuant to N.J.S.A. 47:1A-10. Counsel states that this report should not contain evaluative statements regarding how various BOE employees handled the underlying bullying matter. Counsel also states that this report should contain an objective accounting of what CSA found as a result of their investigation. Counsel further states that this report would not have specifics as to any personnel disciplinary proceedings or actions taken as a result of the findings contained within the report.

Counsel states that in Payton v. New Jersey Turnpike Authority, 148 N.J. 524 (1997), the Court held that executive session discussions of personnel matters could not be redacted if the matter has become public. Counsel also states that the Court held that governmental records subject to privilege no longer retain that privilege if the matter was already public. Counsel states that in the present case, this matter has been the subject of national news reports and local and regional newspaper articles. Counsel also states that the matter of the harassment, intimidation and bullying claims made by the Complainant and R.R. is public knowledge.

Analysis

Whether the Custodian unlawfully denied access to the requested record?

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 ... A government record shall not include the following ... *include inter-agency or intra-agency advisory, consultative, or deliberative material.*” (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.

In the instant matter, the Complainant made a request seeking a copy of a bullying report concerning R.R. In response to the Complainant’s request on June 28, 2011, the Custodian informed the Complainant in writing that access to the bullying report is denied because the responsive report is advisory to the BOE and not a public record. The Custodian certified in the SOI that there is a nine (9) page report dated February 2011 authored by CSA in response to the Complainant’s OPRA request.

The Complainant asserted in the Denial of Access Complaint that she is entitled to any and all information pertaining to her daughter. Conversely, the Custodian argued in the SOI that the bullying report is consultative and advisory to the BOE because it pertains to how the BOE personnel handled and alleged bullying matter. Mr. Petrelli also certified in the SOI that he relied upon CSA’s report in evaluating the staff members’ performance and in making recommendations to the BOE regarding whether disciplinary action should be taken against the staff. Complainant’s Counsel argued in her letter dated November 21, 2011 to the GRC that if a record contains both deliberative and factual material, the deliberative materials must be redacted and the factual materials must be disclosed. Counsel also asserted that this report should contain an objective account of what CSA found as a result of the investigation.

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 GRC⁷ 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:

⁷ Paff v. NJ Department of Labor, Board of Review, GRC Complaint No. 2003-128 (October 2005). Rita Roykovich v. West Milford Board of Education (Passaic), 2011-258 – Findings and Recommendations of the Executive Director

“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:

“[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 nine (9) page bullying report dated February 2011, authored by CSA in response to the Complainant’s request in order to determine the validity of the Custodian’s assertion that said bullying report contains ACD material pursuant to N.J.S.A. 47:1A-1.1.

Whether the Custodian’s actions rise 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. 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 nine (9) page bullying report dated February 2011, authored by CSA in response to the Complainant's request in order to determine the validity of the Custodian's assertion that said bullying report contains advisory, consultative and deliberative material pursuant to N.J.S.A. 47:1A-1.1.
2. **The Custodian must deliver⁸ to the Council in a sealed envelope nine (9) copies of the requested unredacted record (see #1 above), a document or redaction index⁹, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,¹⁰ that the record provided is the record requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**
3. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
4. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Prepared By: Harlynn A. Lack, Esq.
Case Manager

Approved By: Karyn Gordon, Esq.
Acting Executive Director

November 20, 2012¹¹

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

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

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

¹¹ This complaint was prepared and scheduled for adjudication at the Council's November 27, 2012 meeting; however, said meeting was cancelled due to a lack of a quorum.