



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
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PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

August 28, 2018 Government Records Council Meeting

Lisa D. Taylor, Esq.
Complainant

Complaint No. 2016-62

v.

NJ Department of Treasury,
Division of Purchase and Property
Custodian of Record

At the August 28, 2018 public meeting, the Government Records Council (“Council”) considered the August 21, 2018 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 Custodian failed to provide a specific lawful basis for redactions made to communications and other records in response to the Complainant’s OPRA requests, those responses were insufficient pursuant to N.J.S.A. 47:1A-5(g). See Paff v. Borough of Lafayette, GRC Complaint No. 2007-209 (Interim Order dated June 25, 2008), and Schwarz v. N.J. Dep’t of Human Serv., GRC Complaint No. 2004-60 (February 2005).
2. The Custodian did not unlawfully deny access to the evaluation committee deliberations, evaluation sheets, and score sheets requested via the Complainant’s OPRA requests. N.J.S.A. 47:1A-6. The Custodian demonstrated that the withheld and redacted records satisfy the requirements to qualify for protection under the deliberative process privilege via N.J.S.A. 47:1A-1.1. In Re the Liquidation of Integrity Ins. Co., 165 N.J. 75, 84-85, 88 (2000); O’Shea v. West Milford BOE, GRC Complaint No. 2004-93 (April 2006).
3. Because the Custodian certified that no contract has been awarded regarding the RFP at issue in the matter, N.J.S.A. 52:34-10.3(c) protected the identities of the evaluation committee members. Thus, the Custodian lawfully denied access to those redacted portions of the Complainant’s OPRA requests in accordance with N.J.S.A. 47:1A-9(a). N.J.S.A. 47:1A-6.
4. The Custodian provided an insufficient response to the Complainant’s OPRA requests for failing to provide a specific lawful basis for the redactions to responsive records. N.J.S.A. 47:1A-5(g). However, the Custodian lawfully denied access to some of the records, and lawfully redacted others, as they were protected by the deliberative process privilege, or were protected by N.J.S.A. 52:34-10.3(c). Additionally, the evidence of record does not indicate that the Custodian’s technical violation of OPRA had a positive



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

5. The Complainant has not achieved the desired result because the complaints 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 the Denial of Access Complaints and the relief ultimately achieved. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Specifically, the Custodian's technical violation did not result in a change in his conduct. Therefore, the Complainant is not a prevailing party entitled to an award of a reasonable attorney's fee. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. 432, and Mason, 196 N.J. 51; Paff v. Bergen Cnty. & Capt. William Edgar, 2017 N.J. Super. Unpub. LEXIS 627, 22-24 (App. Div. 2017); Carter v. Franklin Fire Dist. No. 2 (Somerset), GRC Complaint No. 2012-101 (April 2013).

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 28th Day of August, 2018

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: August 30, 2018

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Council Staff
August 28, 2018 Council Meeting**

**Lisa D. Taylor, Esq.¹
Complainant**

GRC Complaint No. 2016-62

v.

**N.J. Dep't of Treasury, Div. of Purchase & Property²
Custodial Agency**

Records Relevant to Complaint:

January 19, 2016 OPRA Request No. 1

With respect to Request For Proposal 2016-X-23964 Fiscal Intermediary and Financial Cash and Counseling Services: DHS ("RFP"), copies of all evaluation sheets and all evaluation scores created prior to the recusal of a member of the evaluation committee.

All evaluation sheets, notes with respect to evaluations and/or review of the responses the RFP created by the recused member of the committee.

All evaluation sheets, notes, correspondence, and electronic communications from, referencing, or pertaining to, the original scoring performed.

January 21, 2016 OPRA Request No. 2

With respect to RFP 2016-X-23964 Fiscal Intermediary and Financial Cash and Counseling Services: DHS, copies of all agendas, minutes notes, correspondence and electronic communications referencing, or pertaining to, (i) the representation of using agencies and/or divisions on the evaluation committee both before and after any recusals, and (ii) the agency and/or division affiliation of all members of the evaluation committee both before and after any recusals.

January 21, 2016 OPRA Request No. 3

With respect to RFP 2016-X-23964 Fiscal Intermediary and Financial Cash and Counseling Services: DHS, copies of all agendas, minutes, notes, correspondence, and electronic communications referencing, or pertaining to, recusals or potential conflicts of interest of evaluation committee members.

Custodian of Record: Garry Dales³

Requests Received by Custodian: January 19, 2016; January 21, 2016

Response Made by Custodian: January 28, 2016

GRC Complaint Received: February 22, 2016

¹ Represented by Justin A. Marchetta, Esq., of Inglesino, Webster, Wyciskala & Taylor, LLC (Parsippany, NJ).

² Represented by Deputy Attorney General Clifford Ronces.

³ Cynthia Jablonski was named in the complaint.

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Background⁴

Request and Response:

OPRA Request No. 1

On January 19, 2016 the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On January 28, 2016, Ms. Jablonski responded in writing on behalf of the Custodian for the Division of Purchase and Property (“DPP”) seeking a ten (10) business day extension of time to respond. On February 11, 2016, Ms. Jablonski responded to the Complainant’s OPRA request, denying access to the request for evaluation sheets and score sheets because the protest period for the RFP was ongoing at the time of the request, and thus withheld from disclosure under N.J.S.A. 47:1A-1.1. Regarding access to notes created by a recused committee member, Ms. Jablonski stated there were no responsive records. Lastly, Ms. Jablonski provided responsive records regarding relevant correspondence and electronic communications.

OPRA Request No. 2

On January 21, 2016, the Complainant submitted a 2nd OPRA request to the Custodian seeking the above-mentioned records. On February 1, 2016 Ms. Jablonski responded in writing, on behalf of the Custodian for DPP seeking a ten (10) business day extension of time to respond. On February 16, 2016, Ms. Jablonski responded to the Complainant’s request, providing responsive records in part with redactions, but also denying access to records regarding the affiliation(s) of evaluation committee members before and after recusals, stating that the protest period for the RFP was ongoing, and thus withheld under N.J.S.A. 47:1A-1.1.

OPRA Request No. 3

On January 21, 2016, the Complainant submitted a 3rd OPRA request to the Custodian seeking the above-mentioned records. On February 1, 2016 Ms. Jablonski responded in writing, on behalf of the Custodian for DPP seeking a ten (10) business day extension of time to respond. On February 16, 2016, Ms. Jablonski responded in writing, providing responsive records to the Complainant’s request. However, Ms. Jablonski also stated that some records were withheld from disclosure because the protest period for the RFP was ongoing, and therefore not subject to access under N.J.S.A. 47:1A-1.1.

Denial of Access Complaint:

On February 22, 2016, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that the responses were incomplete and/or contained redactions without including a Vaughn index. For reference, the Complainant stated that she represented Community Access United (“CAU”), a New Jersey non-profit entity which submitted a proposal in response to the RFP. The Complainant asserted that she filed the three OPRA requests at issue subsequently after learning that a member of the

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

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evaluation committee recused him/herself after scoring the proposals submitted in response to the RFP commenced, which were then rescored.

The Complainant first contended that DPP redacted the names of evaluation committee members who raised questions about the submitted RFP proposals (OPRA Request No. 1) or recused themselves due to a conflict (OPRA Request No. 2). The Complainant contended that there is no exemption under N.J.S.A. 47:1A-1.1 that allowed the DPP to redact the names of those members under the circumstances. The Complainant also asserted that there is no other statutory provision which protects the members' identities or any other reason to conceal them.

Additionally, the Complainant argued that the basis for denying access to large portions of requests lacks merit. The Complainant asserted that in response to all three (3) OPRA requests, the Division denied access to records on premise that the designated protest period for the RFP was ongoing at the time the Complainant submitted her requests, and therefore not subject to access under N.J.S.A. 47:1A-1.1, until the protest period ended. The Complainant first argued that the protest period ended on December 22, 2015, four (4) weeks before she submitted her OPRA requests. Furthermore, the Complainant contended that while OPRA acknowledges the importance of protecting access to bid documents to prevent granting unfair advantages to competitors, a protest period occurs only when the agency receives all bids and issues an intent to award a contract. The Complainant asserted that a competing bidder cannot gain an advantage from bid information because by that point the bidder would have already submitted their own proposal.

The Complainant next contended that the DPP engaged in unlawful delay tactics in extending the time to respond to her OPRA requests. The Complainant asserted that the "Notice of Intent to Award" ("Notice") a contract was issued on November 23, 2015, and the protest period expired on December 22, 2015. The Complainant asserted that it would have been impossible for the DPP to have archived the responsive records within a short amount of time. The Complainant asserted that these extensions exhibit a pattern of behavior of abuse of process by the DPP to frustrate CAU's protest of the "Notice."⁵ The Complainant contended that pursuant to Kohn v. Twp. of Livingston, GRC Complaint No. 2011-330 (February 2013), readily available records should be produced without delay.

Accordingly, the Complainant requested that the Council: 1) determine that DPP violated its statutory obligations; 2) order DPP to produce all responsive records immediately and in full; and 3) determine that she is a prevailing party entitled to an award of reasonable attorney's fees and costs.

Statement of Information:

On March 11, 2016, the Custodian filed a Statement of Information ("SOI"). The Custodian certified that the "Notice" sent to CAU and other participating bidders announced the winner of the RFP and provided for a bid protest period through December 8, 2015. The Custodian then certified that on December 8, 2015, DPP notified bidders via e-mail that the protest period had been extended to December 22, 2015. The Custodian certified that CAU submitted a bid protest

⁵ The Complainant previously filed a Denial of Access Complaint (GRC Complaint No. 2015-395), which pertained to the same RFP in this matter, but does not relate to the OPRA requests at issue.

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on December 8, 2015, and a supplement to same on December 22, 2015. The Custodian certified that CAU was the only bidder to file a protest, and as of the date of the SOI, the protest was still under review by the Director of DPP.

OPRA Request No. 1

The Custodian certified that on January 19, 2016, he received an OPRA request from the Complainant. The Custodian certified that, on his behalf, Ms. Jablonski timely responded in writing to OPRA Request No. 1 on February 11, 2016. The Custodian asserted that the Complainant was denied access to the evaluation and score sheets created prior to the recusal of an evaluation committee member on the basis that the request was received during the designated protest period, and was deliberative material as defined under N.J.S.A. 47:1A-1.1. The Custodian asserted that the Complainant was informed that once a contract was awarded, she could resubmit her request. As for the request for notes related to evaluations and review of the responses to the RFP created by the recused member, the Custodian stated that he was advised that no responsive records exist. Lastly, the Custodian asserted that the correspondence and electronic communications pertaining to the original scoring were provided to the Complainant with redactions pursuant to N.J.S.A. 47:1A-1.1 and N.J.S.A. 52:34-10.3.

The Custodian then certified that he received OPRA Request No. 2 from the Complainant on January 22, 2016, and that Ms. Jablonski timely responded on February 16, 2016. The Custodian asserted that records were provided to the Complainant regarding representation of using agencies and/or divisions on the evaluation committee both before and after recusals. As to the request for the agency/division affiliation of the committee members before and after recusals, the Custodian asserted that the request was denied because it was received during the designated protest period, and contained information that could provide an unfair advantage to competitors if disclosed. See N.J.S.A. 47:1A-1.1. The Custodian asserted that the Complainant was advised that once a contract was awarded, she could resubmit her OPRA request.

The Custodian also certified that he received OPRA Request No. 3 from the Complainant on January 22, 2016, and that Ms. Jablonski timely responded on February 16, 2016. The Custodian asserted that the Complainant was provided responsive records regarding her request for agendas, minutes, notes, correspondence and electronic communications pertaining to recusals or potential conflicts of interest of evaluation committee. The Custodian asserted that redactions were made under N.J.S.A. 47:1A-1.1, asserting that the bid protest was ongoing, and releasing such information could give an advantage to bidders or competitors. The Custodian again asserted that the Complainant was informed that she could resubmit her request once a contract was awarded.

The Custodian asserted that the requested evaluation sheets and evaluation scores were properly withheld from disclosure because releasing the records would give an unfair advantage to bidders, and are protected under the deliberative process privilege pursuant to N.J.S.A. 47:1A-1.1. See In re Liquidation of Integrity Ins. Co., 165 N.J. 75 (2000), and Education Law Ctr. V. New Jersey Dep't of Educ., 198 N.J. 274 (2009). The Custodian asserted that the documents generated by the evaluation committee during its review process, including score sheets, are deliberative as they are used by the Director of DPP ("Director") to make a final decision. The

Custodian argued that because no final agency decision has been made, the evaluation sheets and scores are protected by the deliberative process privilege. Additionally, the Custodian argued that these records are sensitive records to where if they were disclosed, they may provide a bidder with an unfair advantage over other competitors.

The Custodian contended that the Complainant's argument that the protest period ended on December 22, 2015 misrepresents the status of the procurement process. The Custodian noted that CAU filed a bid protest on December 8, 2015, and a supplement on December 22, 2015. The Custodian asserted that the bid protest remains under consideration by the Director, and therefore no final agency decision has been on the matter. The Custodian contended that even though the time to submit a bid protest has lapsed, no award of the contract has been made, and thus the requested records remain confidential.

The Custodian further argued that evaluation committee deliberations are also protected by the deliberative process privilege. The Custodian asserted that the evaluation committee sheets and scores are both pre-decisional and deliberative, since the committee is charged with evaluating competing bidders based upon the needs identified within the RFP as well as their own experience and expertise. The Custodian contended that those recommendations are then considered by the Director to decide on a winning bidder. The Custodian also noted that the RFP can be rescinded at any time prior to the award of a contract. See N.J.S.A. 52:34-12. The Custodian argued that this possibility leaves open the potential for bidders to obtain an unfair advantage from obtaining evaluation sheets and scores, even after the deadline to submit a bid proposal has passed.

Next, the Custodian contended that the redactions of the names of evaluation committee members were proper under New Jersey statute. The Custodian asserted that under N.J.S.A. 47:1A-9, OPRA protects records from access if they are protected via other statutes, regulations, or Executive Orders. The Custodian contended that under N.J.S.A. 52:34-10.3(c), the names of the members of an evaluation committee will be made public only until a contract is awarded. The Custodian asserted that protecting the identities of the evaluation committee members is fundamental to the integrity of the bidding process. The Custodian contended that if the identities of the evaluation committee members were released, a vendor could potentially make contact with a member, make contact, and influence the member in their decision-making. The Custodian also argued that releasing the members' identities prior to awarding a contract could expose them to disgruntled bidders who may decide to harass members and question their scoring decisions.

Regarding the extensions, the Custodian argued that they were proper, and that the responses provided to the Complainant were timely pursuant to N.J.S.A. 47:1A-5(i). The Custodian asserted that relevant GRC case law supports a Custodian seeking an extension of time when made in writing and providing a date certain. See Paff v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2011-77 (June 2012); Rivera v. City of Plainfield Police Dep't (Union), GRC Complaint No. 2009-317 (May 2011); Criscione v. Town of Guttenberg (Hudson), GRC Complaint No. 2010-68 (November 2010); Rivera v. Union City Bd. of Educ. (Hudson), GRC Complaint No. 2008-112 (April 2010); O'Shea v. Borough of Hopatcong (Sussex), GRC Complaint No. 2009-223 (December 2010); Starkey v. N.J. Dep't of Transportation, GRC Complaint Nos. 2007-315 through 317 (February 2009). The Custodian asserted that the nature of the requests and their connection with an active procurement warranted an extension. The

Custodian contended that an extension request was submitted in writing, with a specific return date for all three (2) OPRA requests. The Custodian asserted that therefore the extensions were proper.

Analysis

Timeliness/Sufficiency of Response

OPRA provides that a custodian may request an extension of time to respond to the complainant's OPRA request, but the custodian must provide a specific date by which he/she will respond. Should the custodian fail to respond by that specific date, "access shall be deemed denied." N.J.S.A. 47:1A-5(i).

In Rivera, GRC 2009-317, the custodian responded in writing to the complainant's request on the fourth (4th) business day by seeking an extension of time to respond and providing an anticipated date by which the requested records would be made available. The complainant did not consent to the custodian's request for an extension of time. The Council stated that:

The Council has further described the requirements for a proper request for an extension of time. Specifically, in [Starkey, GRC 2007-315, *et seq.*], the Custodian provided the Complainant with a written response to his OPRA request on the second (2nd) business day following receipt of said request in which the Custodian requested an extension of time to respond to said request and provided the Complainant with an anticipated deadline date upon which the Custodian would respond to the request. The Council held that "because the Custodian requested an extension of time in writing within the statutorily mandated seven (7) business days and provided an anticipated deadline date of when the requested records would be made available, the Custodian properly requested said extension pursuant to N.J.S.A. 47:1A-5(g) [and] N.J.S.A. 47:1A-5(i).

Further, in Criscione, GRC 2010-68, the Council held that the custodian did not unlawfully deny access to the requested records, stating in pertinent part that:

[B]ecause the Custodian provided a written response requesting an extension on the sixth (6th) business day following receipt of the Complainant's OPRA request and providing a date certain on which to expect production of the records requested, and, notwithstanding the fact that the Complainant did not agree to the extension of time requested by the Custodian, the Custodian's request for an extension of time [to a specific date] to respond to the Complainant's OPRA request was made in writing within the statutorily mandated seven (7) business day response time.

Moreover, in Werner, GRC 2011-151, the Council again addressed whether the custodian lawfully sought an extension of time to respond to the complainant's OPRA request. The Council concluded that because the custodian requested an extension of time in writing within the statutorily mandated seven (7) business days and provided an anticipated date by which the requested records would be made available, the custodian properly requested the extension

pursuant to OPRA. See also Rivera, GRC 2009-317; Criscione, GRC 2010-68; and Starkey, GRC 2007-315, *et seq.*

In determining whether the extensions were ultimately unreasonable, the GRC looks to its prior decision in Rodriguez v. Kean Univ., GRC Complaint No. 2016-128 (November 2017), although decided during the pendency of this complaint, for instruction. There, the Council found that the Custodian's thirty (30) business day extension to provide seventeen (17) pages of responsive records was reasonable because of the Custodian's complications with the wording and interpretation of the OPRA request. Furthermore, the Custodian made note of the assistance she sought and received from other employees in order to fulfill the request.

Here, the OPRA request was not complicated in wording, but obviously produced voluminous pages of records numbering 550. However, similar to the facts in Rodriguez, the Custodian here certified to the involved search necessary to ensure that all responsive records were located. Further, the Custodian here ultimately provided roughly twenty-six (26) times the page amount of records here, with redactions, than in Rodriguez in a little more than double the time frame. Therefore, the GRC finds that extending the response time for the OPRA request to the extent demonstrated in the instant matter was not excessive.

In the instant matter, although the requests pertained to a particular subject matter, the Complainant sought several categories of records and forms of correspondence. Notwithstanding, Ms. Jablonski sought a fraction of the time requested in Rodriguez, and responded to each OPRA request within the extended time. Additionally, since the Complainant's client was directly involved with the RFP that was the subject of the requests, it was not unreasonable for the Custodian to seek an extension of time for further evaluation. Therefore, the GRC finds that extending the response time for the OPRA requests to the extent demonstrated in the instant matter was not excessive.

However, OPRA provides that if a "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.*" N.J.S.A. 47:1A-5(g) (emphasis added). Thus, OPRA requires that, when providing access to redacted records, a custodian shall provide a specific lawful basis for redactions. The Council has held that when responding to an ORPA request with redacted records, the custodian must provide a specific legal basis for redactions. See Paff v. Borough of Lafayette, GRC Complaint No. 2007-209 (Interim Order dated June 25, 2008). Additionally, the specific citations to the law which justify the redactions are required at the time of the response. See Schwarz v. N.J. Dep't of Human Serv., GRC Complaint No. 2004-60 (February 2005).

In the current matter, the Custodian timely responded to the Complainant's OPRA requests on February 11, 2016 and February 16, 2016. However, the Custodian failed to provide a specific lawful basis for the redactions at the time of the responses. It was not until providing the SOI that the Custodian stated the redactions were pursuant to N.J.S.A. 52:34-10.3(c), or were protected by the deliberative process privilege.

Therefore, because the Custodian failed to provide a specific lawful basis for redactions made to communications and other records in response to the Complainant's OPRA requests, those

responses were insufficient pursuant to N.J.S.A. 47:1A-5(g). See Paff, GRC 2007-209, and Schwarz, GRC 2004-60.

Unlawful Denial of Access

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

Evaluation Sheets, Score Sheets

The Custodian asserted that the evaluation committee deliberations, evaluation sheets, and score sheets were withheld because they were “protected from disclosure under the deliberative process privilege.”

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 BOE, GRC Complaint No. 2004-93 (April 2006), the Council stated that:

[N]either 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 Ins. Co., 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 (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 the decision-making process and its disclosure would reveal deliberations that occurred during that process. Educ. Law Ctr., 198 N.J. at 274. 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 Integrity at 84-88. 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. Coll. Hosp., 99 N.J. 346 (1985). Id. 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.

[Id. at 84-85 (citations omitted).]

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

The 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.

[Integrity, 165 N.J. at 88 (citing McClain, 99 N.J. at 361-62).]

Here, the Custodian certified that at the time he submitted his SOI, no contract has been awarded for the RFP that is the subject of the Complainant's OPRA requests. While the Complainant asserted that protest period deadline occurred several weeks prior to submitting her OPRA requests, the GRC agrees with Custodian's argument that the deadline does not signal the end of the process. The protest period deadline serves as the end for bidders to submit documentation to support their protest application. However, those submissions are then reviewed by the DPP, and the Custodian certified that CAU's protest was still under review, thereby delaying the award of a contract. Thus, the evaluation committee deliberations, which include the evaluation sheets and score sheets, remained pre-decisional at the time of the OPRA request. Additionally,

the Custodian certified that the deliberations, score sheets, and evaluation sheets are collected and created by the evaluation committee and provided to the DPP consider and use to decide a winner, if any, of a contract, making such records deliberative in nature. Therefore, the redacted records satisfy the requirements under Integrity, 165 N.J. at 84-85, 88.

Therefore, the Custodian did not unlawfully deny access to the evaluation committee deliberations, evaluation sheets, and score sheets requested via the Complainant's OPRA requests. N.J.S.A. 47:1A-6. The Custodian demonstrated that the withheld and redacted records satisfy the requirements to qualify for protection under the deliberative process privilege via N.J.S.A. 47:1A-1.1. Integrity, 165 N.J. at 84-85, 88; O'Shea, GRC 2004-93.

Identities of Evaluation Committee Members

OPRA also provides that its provisions:

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

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

The Complainant asserted that there is no statutory provision which protects the identities of the evaluation committee members, or any reason to conceal them at the point of the request. However, the Custodian provided that N.J.S.A. 52:34-10.3(c) protects the identities of the members until a contract is awarded. Additionally, the Custodian certified that at the time of the request no contract had been awarded for the RFP at issue, because CAU's protest was still being evaluated.

Therefore, because the Custodian certified that no contract has been awarded regarding the RFP at issue in the matter, N.J.S.A. 52:34-10.3(c) protected the identities of the evaluation committee members. Thus, the Custodian lawfully denied access to those redacted portions of the Complainant's OPRA requests in accordance with N.J.S.A. 47:1A-9(a). N.J.S.A. 47:1A-6.

Knowing & Willful

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 ". . . [i]f the council determines, by a majority vote of its members, that a custodian has knowingly and willfully violated [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, the council may impose the penalties provided for in [OPRA] . . ." N.J.S.A. 47:1A-7(e).

Certain legal standards must be considered when making the determination of whether the Custodian's actions rise to the level of a "knowing and willful" violation of OPRA. The following statements must be true for a determination that the Custodian "knowingly and willfully" violated OPRA: the Custodian's actions must have been much more than negligent conduct (Alston v. City of Camden, 168 N.J. 170, 185 (2001)); the Custodian must have had some knowledge that his actions were wrongful (Fielder v. Stonack, 141 N.J. 101, 124 (1995)); the Custodian's actions must have had a positive element of conscious wrongdoing (Berg v. Reaction Motors Div., 37 N.J. 396, 414 (1962)); the Custodian's actions must have been forbidden with actual, not imputed, knowledge that the actions were forbidden (*id.*; Marley v. Borough of Palmyra, 193 N.J. Super. 271, 294-95 (Law Div. 1993)); 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)).

Here, the Custodian provided an insufficient response to the Complainant's OPRA requests for failing to provide a specific lawful basis for the redactions to responsive records. N.J.S.A. 47:1A-5(g). However, the Custodian lawfully denied access to some of the records, and lawfully redacted others, as they were protected by the deliberative process privilege, or were protected by N.J.S.A. 52:34-10.3(c). Additionally, the evidence of record does not indicate that the Custodian's technical violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Prevailing Party Attorney's Fees

OPRA provides that:

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

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

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

Additionally, the New Jersey Supreme Court has ruled on the issue of "prevailing party" attorney's fees. In Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (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, 196 N.J. at 71, (quoting Buckhannon Bd. & Care Home v. West Virginia Dep’t of Health & Human Res., 532 U.S. 598, 131 S. Ct. 1835, 149 L. Ed. 2d 855 (2001)). In Buckhannon, the Supreme Court stated that the phrase “prevailing party” is a legal term of art that refers to a “party in whose favor a judgment is rendered.” (quoting Black’s Law Dictionary 1145 (7th ed. 1999)). The Supreme Court rejected the catalyst theory as a basis for prevailing party attorney fees, in part because “[i]t allows an award where there is no judicially sanctioned change in the legal relationship of the parties, Id. at 605, 121 S. Ct. at 1840, 149 L. Ed. 2d at 863, 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, that Buckhannon is binding only when counsel fee provisions under federal statutes are at issue. 196 N.J. at 72, citing Teeters, 387 N.J. Super. at 429; see e.g., Baer v. Klagholz, 346 N.J. Super. 79 (App. Div. 2001) (applying Buckhannon to the federal Individuals with Disabilities Education Act), certify. denied, 174 N.J. 193 (2002). “But in interpreting New Jersey law, we look to state law precedent and the specific state statute before us. When appropriate, we depart from the reasoning of federal cases that interpret comparable federal statutes.” 196 N.J. at 73 (citations omitted).

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

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

[Mason at 73-76 (2008).]

The Court in Mason further held that:

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

[Id. at 76.]

More recently, in Paff v. Bergen Cnty. & Capt. William Edgar, 2017 N.J. Super. Unpub. LEXIS 627, 22-24 (App. Div. 2017), the Court found that defendants timely disclosed records with appropriate redactions but failed to provide a specific lawful basis for the redactions. The

Court was thus tasked with determining whether plaintiff was a prevailing party based on a technical violation of OPRA. The Court held that it could “locate no authority . . . imposing attorney’s fees” because of the technical violation. The Court therefore held that the plaintiff was not entitled to attorney’s fees. See also Carter v. Franklin Fire Dist. No. 2 (Somerset), GRC Complaint No. 2012-101 (April 2013) (holding that the GRC “did not order disclosure of any records and the Custodian’s technical violation of OPRA did not represent a change in the Custodian’s conduct.”).

The Complainant filed the instant complaint on February 22, 2016, contending that the Custodian unlawfully denied access to three (3) OPRA requests. Therein, the Complainant argued that she believed the Custodian unlawfully withheld records and unlawfully redacted those records that were provided. The evidence in the record demonstrated that the Custodian failed to provide a specific lawful basis for the redactions. The GRC therefore finds that the Custodian violated OPRA. However, the GRC is not ordering any further action by the Custodian. Further, technical violations of OPRA do not represent a change warranting an award of prevailing party attorney’s fees. Paff, 2017 N.J. Super. Unpub. at 22-24; Carter, GRC 2012-101.

Therefore, the Complainant has not achieved the desired result because the complaints did not bring about a change (voluntary or otherwise) in the custodian’s conduct. Teeters, 387 N.J. Super. 432. Additionally, no factual causal nexus exists between the Complainant’s filing of the Denial of Access Complaints and the relief ultimately achieved. Mason, 196 N.J. 51. Specifically, the Custodian’s technical violation did not result in a change in his conduct. Therefore, the Complainant is not a prevailing party and is not entitled to an award of a reasonable attorney’s fee. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. 432, and Mason, 196 N.J. 51; Paff, 2017 N.J. Super. Unpub. at 22-24; Carter, GRC 2012-101.

Conclusions and Recommendations

The Council Staff respectfully recommends the Council find that:

1. Because the Custodian failed to provide a specific lawful basis for redactions made to communications and other records in response to the Complainant’s OPRA requests, those responses were insufficient pursuant to N.J.S.A. 47:1A-5(g). See Paff v. Borough of Lafayette, GRC Complaint No. 2007-209 (Interim Order dated June 25, 2008), and Schwarz v. N.J. Dep’t of Human Serv., GRC Complaint No. 2004-60 (February 2005).
2. The Custodian did not unlawfully deny access to the evaluation committee deliberations, evaluation sheets, and score sheets requested via the Complainant’s OPRA requests. N.J.S.A. 47:1A-6. The Custodian demonstrated that the withheld and redacted records satisfy the requirements to qualify for protection under the deliberative process privilege via N.J.S.A. 47:1A-1.1. In Re the Liquidation of Integrity Ins. Co., 165 N.J. 75, 84-85, 88 (2000); O’Shea v. West Milford BOE, GRC Complaint No. 2004-93 (April 2006).
3. Because the Custodian certified that no contract has been awarded regarding the RFP at issue in the matter, N.J.S.A. 52:34-10.3(c) protected the identities of the evaluation

committee members. Thus, the Custodian lawfully denied access to those redacted portions of the Complainant's OPRA requests in accordance with N.J.S.A. 47:1A-9(a). N.J.S.A. 47:1A-6.

4. The Custodian provided an insufficient response to the Complainant's OPRA requests for failing to provide a specific lawful basis for the redactions to responsive records. N.J.S.A. 47:1A-5(g). However, the Custodian lawfully denied access to some of the records, and lawfully redacted others, as they were protected by the deliberative process privilege, or were protected by N.J.S.A. 52:34-10.3(c). Additionally, the evidence of record does not indicate that the Custodian's technical violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.
5. The Complainant has not achieved the desired result because the complaints 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 the Denial of Access Complaints and the relief ultimately achieved. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Specifically, the Custodian's technical violation did not result in a change in his conduct. Therefore, the Complainant is not a prevailing party entitled to an award of a reasonable attorney's fee. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. 432, and Mason, 196 N.J. 51; Paff v. Bergen Cnty. & Capt. William Edgar, 2017 N.J. Super. Unpub. LEXIS 627, 22-24 (App. Div. 2017); Carter v. Franklin Fire Dist. No. 2 (Somerset), GRC Complaint No. 2012-101 (April 2013).

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