



State of New Jersey  
DEPARTMENT OF COMMUNITY AFFAIRS  
101 SOUTH BROAD STREET  
PO Box 819  
TRENTON, NJ 08625-0819

PHILIP D. MURPHY  
Governor

LT. GOVERNOR SHEILA Y. OLIVER  
Commissioner

**FINAL DECISION**

**May 21, 2019 Government Records Council Meeting**

Julie Ramirez  
Complainant

Complaint No. 2017-64

v.

Princeton Charter School (Mercer)  
Custodian of Record

At the May 21, 2019 public meeting, the Government Records Council (“Council”) considered the May 14, 2019 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that the Complainant’s March 15, 2017 OPRA request seeking e-mail correspondence was invalid as it failed to identify a subject or content matter. See MAG Entm’t, LLC v. Div. of ABC, 375 N.J. Super. 534, 549 (App. Div. 2005); Ciszewski v. Newton Police Dep’t (Sussex), GRC Complaint No. 2013-90 (October 2013); Elcavage v. West Milford Twp. (Passaic), GRC Complaint No. 2009-07 (April 2010); and Sandoval v. N.J. State Parole Bd., GRC Complaint No. 2006-167 (Interim Order dated March 28, 2007). As such, there was no unlawful denial of access. N.J.S.A. 47:1A-6.

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 21<sup>st</sup> Day of May 2019

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 22, 2019**



**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Council Staff  
May 21, 2019 Council Meeting**

**Julie Ramirez<sup>1</sup>  
Complainant**

**GRC Complaint No. 2017-64**

v.

**Princeton Charter School (Mercer)<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** Electronic copies of:

1. Any and all correspondence between any Princeton Charter School [“PCS”] trustee and any public relations, communications, lobbying or strategy firms or consultants between September 1, 2016 and March 15, 2017.
2. Any and all correspondence between Larry Patton, Lisa Eckstrom, Gail Wilber and any public relations communications, lobbying or strategy firms or consultants between September 1, 2016 and March 15, 2017.

**Custodian of Record:** Michael Falkowski

**Request Received by Custodian:** March 15, 2017

**Response Made by Custodian:** March 22, 2017

**GRC Complaint Received:** March 28, 2017

**Background<sup>3</sup>**

**Request and Response:**

On March 15, 2017, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On March 22, 2017, the Custodian responded in writing, asserting that both items seek communications which are protected by the attorney-client privilege and which are advisory, consultative, and deliberative (“ACD”) in nature.

**Denial of Access Complaint:**

On March 28, 2017 the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant did not elaborate on the circumstances pertaining to the Custodian’s response.

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

<sup>2</sup> Represented by Thomas Johnston, Esq., of Johnston Law Firm, LLC (Montclair, NJ).

<sup>3</sup> 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.

Statement of Information:<sup>4</sup>

On July 28, 2017, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that he received the Complainant’s OPRA request on March 15, 2017. The Custodian certified that he responded in writing on March 22, 2017, denying access to the Complainant’s OPRA request. The Custodian also provided an extensive index identifying each responsive record and the basis for denial.

On August 7, 2017, the Custodian provided a supplement to the SOI, containing Item 12. As a background, the Custodian asserted that on December 1, 2016, PCS filed with the State Commissioner of Education (“Commissioner”) an application to amend its charter to increase PCS’s maximum student enrollment and implement an admission lottery. The Custodian stated that Princeton Public Schools (“PPS”) announced its opposition to the application, requiring PCS to obtain Counsel and public relations professionals to manage the dispute with PPS. The Custodian asserted that River Crossing Strategy Group (“River Crossing”) was the public relations firm hired by PCS and coordinated with Counsel to perform services for PCS.

The Custodian asserted that on December 27, 2016, PPS filed an action against PCS in Superior Court for claims against the Open Public Meetings Act. The Custodian then stated that on January 11, 2017, PCS re-affirmed its decision to file an amended application to the Commissioner. The Custodian stated that on January 30, 2017, PPS filed an opposition to the amended application, which PCS in turn filed an additional memo in support.

The Custodian then stated that on February 28, 2017, the Commissioner granted PCS’s amended application. The Custodian asserted that PPS filed a notice of appeal to the Commissioner’s approval on March 10, 2017, and thereafter a request for a stay on granting the approved application on March 17, 2017. The Custodian asserted that throughout the application process, PCS coordinated with Counsel and River Crossing in response to PPS’s opposition campaign against the expansion proposal.

The Custodian asserted that OPRA expressly exempts attorney-client communications from disclosure and codified under N.J.S.A. 2A:84A-201(1) and N.J.R.E. 504. The Custodian asserted that courts have held the attorney-client privilege applies to communications between a “public body and an attorney retained to represent it.” Paff v. Div. of Law, 412 N.J. Super. at 140, 152 (App. Div. 2010). The Custodian also noted that the privilege is not waived when communications are revealed to a third-party, when said party is necessary to advance the representation. O’Boyle v. Borough of Longport, 218 N.J. 168, 186 (2014). Furthermore, the Custodian asserted that the privilege has been extended to include those communications involving the client’s public relations consultants. See In re Grand Jury Subpoenas, 265 F. Supp. 2d 321 (S.D.N.Y. 2003).

The Custodian contended that in the current matter, communications between Counsel and River Crossing were made to assist in delivering legal advice surrounding PPS’s opposition to the

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<sup>4</sup> The Complaint was referred to mediation on April 19, 2017. The Complaint was referred back from mediation on June 30, 2017.

amended application. The Custodian asserted that such communications qualify under the privilege.

The Custodian also argued that the requested records are protected under the attorney work product doctrine, since they were kept confidential, assisted Counsel and were made in reply to anticipated and actual litigation. The Custodian contended that R. 4:10-2(c) provides protection against disclosure of attorney work product. The Custodian also noted that this protection extended to product and communications generated by third parties assisting counsel, including public relations professionals. Haugh v. Schroder Inv. Mgmt. N. Am., Inc., 2003 U.S. Dist. LEXIS 14586, at \*\*4-5 (S.D.N.Y. 2003); Calvin Klein Trademark Trust v. Wachner, 198 F.R.D. 53, 55-56 (S.D.N.Y. 2000).

Additionally, the Custodian asserted that the requested records contain ACD material. N.J.S.A. 47:1A-1.1. The Custodian asserted that the documents satisfied the two-pronged test outlined in Ciesla v. N.J. Dep't of Health and Sr. Servs., 429 N.J. Super. 127, 137 (App. Div. 2012). The Custodian asserted that PCS's deliberative efforts to advance its amended application and respond to opposition constituted the connection between the pre-decisional communications and policy goal of expanding enrollment and modifying its lottery system.

### Analysis

#### Validity of Request

The Council is permitted to raise additional defenses regarding the disclosure of records pursuant to Paff v. Twp. of Plainsboro, 2007 N.J. Super. Unpub. LEXIS 2135 (App. Div. 2007) (certif. denied, 193 N.J. 292 (2007)).<sup>5</sup> In Paff, the complainant challenged the GRC's authority to uphold a denial of access for reasons never raised by the custodian. Specifically, the Council did not uphold the basis for the redactions cited by the custodian. The Council, on its own initiative, determined that the Open Public Meetings Act prohibited the disclosure of the redacted portions to the requested executive session minutes. The Council affirmed the custodian's denial to portions of the executive session minutes but for reasons other than those cited by the custodian. The complainant argued that the GRC did not have the authority to do anything other than determine whether the custodian's cited basis for denial was lawful. The court held that:

The GRC has an independent obligation to "render a decision as to whether the record which is the subject of the complaint is a government record which must be made available for public access pursuant to' OPRA . . . The GRC is not limited to assessing the correctness of the reasons given for the custodian's initial determination; it is charged with determining if the initial decision was correct."

The court further stated that:

Aside from the clear statutory mandate to decide if OPRA requires disclosure, the authority of a reviewing agency to affirm on reasons not advanced by the reviewed agency is well established. Cf. Bryant v. City of Atl. City, 309 N.J. Super. 596, 629-

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<sup>5</sup> On appeal from Paff v. Township of Plainsboro, GRC Complaint No. 2005-29 (March 2006).

30 (App. Div. 1998) (citing Isko v. Planning Bd. of Livingston, 51 N.J. 162, 175 (1968) (lower court decision may be affirmed for reasons other than those given below)); Dwyer v. Erie Inv. Co., 138 N.J. Super. 93, 98 (App. Div. 1975) (judgments must be affirmed even if lower court gives wrong reason), certif. denied, 70 N.J. 142 (1976); Bauer v. 141-149 Cedar Lane Holding Co., 42 N.J. Super. 110, 121 (App. Div. 1956) (question for reviewing court is propriety of action reviewed, not the reason for the action) (aff'd, 24 N.J. 139 (1957)).

The New Jersey Appellate Division has held that:

While OPRA provides an alternative means of access to government documents not otherwise exempted from its reach, *it is not intended as a research tool litigants may use to force government officials to identify and siphon useful information. Rather, OPRA simply operates to make identifiable government records “readily accessible for inspection, copying, or examination.”* N.J.S.A. 47:1A-1.

[MAG Entm’t, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005) (emphasis added).]

The Court reasoned that:

Most significantly, the request failed to identify with any specificity or particularity the governmental records sought. *MAG provided neither names nor any identifiers other than a broad generic description of a brand or type of case prosecuted by the agency in the past.* Such an open-ended demand required the Division's records custodian to manually search through all of the agency's files, analyze, compile and collate the information contained therein, and identify for MAG the cases relative to its selective enforcement defense in the OAL litigation. Further, once the cases were identified, the records custodian would then be required to evaluate, sort out, and determine the documents to be produced and those otherwise exempted.

[Id. at 549 (emphasis added).]

The Court further held that “[u]nder OPRA, agencies are required to disclose only ‘identifiable’ government records not otherwise exempt . . . In short, OPRA does not countenance open-ended searches of an agency's files.” Id. (emphasis added). Bent, 381 N.J. Super. at 37,<sup>6</sup> N.J. Builders Assoc. v. N.J. Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).

The validity of an OPRA request typically falls into three (3) categories. The first is a request that is overly broad (“any and all,” requests seeking “records” generically, *etc.*) requires a custodian to conduct research. MAG, 375 N.J. Super. at 534; Donato, GRC 2005-182. The second is those requests seeking information or asking questions. See e.g. Rummel v. Cumberland Cnty. Bd. of Chosen Freeholders, GRC Complaint No. 2011-168 (December 2012). The final category

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<sup>6</sup> Affirmed on appeal regarding Bent v. Stafford Police Department, GRC Complaint No. 2004-78 (October 2004).

is a request that is either not on an official OPRA request form or does not invoke OPRA. See e.g. Naples v. N.J. Motor Vehicle Comm'n, GRC Complaint No. 2008-97 (December 2008).

Regarding requests for e-mails and correspondence, the GRC has established specific criteria deemed necessary under OPRA to request such records in Elcavage v. West Milford Twp. (Passaic), GRC Complaint No. 2009-07 (April 2010). The Council determined that to be valid, such requests must contain (1) the content and/or subject of the email, (2) the specific date or range of dates during which the email(s) were transmitted, and (3) the identity of the sender and/or the recipient thereof. Id.; see also Sandoval v. N.J. State Parole Bd., GRC Complaint No. 2006-167 (Interim Order dated March 28, 2007). In Ciszewski v. Newton Police Dep't (Sussex), GRC Complaint No. 2013-90 (October 2013), the complainant sought in part correspondence he submitted to the custodian since January 2010, and any correspondence generated in response thereto. The GRC held that such request was invalid as it failed to identify a subject matter:

The Complainant's request did not include a subject for the correspondence; it generally sought all correspondence the Complainant sent to the NPD for a certain time frame and all records generated from that correspondence. Following the criteria set forth in Elcavage, 2009-07, and the facts presented herein, the GRC is satisfied that the lack of subject in the Complainant's request did not provide the original Custodian enough information to reasonably identify the records the Complainant sought and thus the request was invalid. This complaint is also distinguishable from [Burke v. Brandes, 429 N.J. Super. 169 (App. Div. 2012)], and [Gannett v. Cnty. of Middlesex, 379 N.J. Super. 205 (App. Div. 2005)], because although the original Custodian attempted to respond to same, her failure to provide the responsive records sought reinforces that the request did not reasonably identify the records sought. See Wolosky v. Township of Boonton (Morris), GRC Complaint No. 2010-243 (February 2012) at 6-7 (holding that the custodian's failure to initially identify and provide every responsive record reinforced the fact that insufficient nature of the complainant's request).

[Id. at 5.]

In the current matter, the Complainant's OPRA request item No. 1 sought "any and all correspondence between any [PCS] trustee and any public relations, communications, lobbying or strategy firms or consultants between September 1, 2016 and March 15, 2017." The Complainant's OPRA request item No. 2 also sought the correspondence but specified three (3) individuals over the same period. As was the case in Ciszewski, GRC 2013-90, the Complainant failed to identify a subject matter for either request item. Although the Custodian conducted a search, the lack of a subject matter resulted in a voluminous amount of records for the Custodian to review for potential redactions.

Therefore, the Complainant's March 15, 2017 OPRA request seeking e-mail correspondence was invalid as it failed to identify a subject or content matter. See MAG, 375 N.J. Super. at 549; Ciszewski, GRC No. 2013-90; Elcavage, GRC No. 2009-09; and Sandoval, GRC No. 2006-167. As such, there was no unlawful denial of access. N.J.S.A. 47:1A-6.

## **Conclusions and Recommendations**

The Council Staff respectfully recommends the Council find that the Complainant's March 15, 2017 OPRA request seeking e-mail correspondence was invalid as it failed to identify a subject or content matter. See MAG Entm't, LLC v. Div. of ABC, 375 N.J. Super. 534, 549 (App. Div. 2005); Ciszewski v. Newton Police Dep't (Sussex), GRC Complaint No. 2013-90 (October 2013); Elcavage v. West Milford Twp. (Passaic), GRC Complaint No. 2009-07 (April 2010); and Sandoval v. N.J. State Parole Bd., GRC Complaint No. 2006-167 (Interim Order dated March 28, 2007). As such, there was no unlawful denial of access. N.J.S.A. 47:1A-6.

Prepared By: Samuel A. Rosado  
Staff Attorney

May 14, 2019