INTERIM ORDER

April 30, 2019 Government Records Council Meeting

Micaela P. Bennett  
Complainant

v.

West Orange Board of Education (Essex)  
Custodian of Record

Complaint No. 2018-209

At the April 30, 2019 public meeting, the Government Records Council (“Council”) considered the April 23, 2019 Findings and Recommendations of the Council Staff 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. This complaint should thus be referred to the Office of Administrative Law for a determination on the Complainant’s objection to representation and appropriate action as applicable. N.J.A.C. 5:105-1, et seq.; N.J.A.C. 1:1-5.3.

2. For the purpose of efficacy, this complaint should be referred to the Office of Administrative Law for a determination as to whether the Custodian unlawfully denied access to the responsive report. N.J.S.A. 47:1A-6. Should the OAL find that an unlawful denial of access occurred, it shall order disclosure and determine whether the Custodian knowing and willfully denied access to same.

Interim Order Rendered by the  
Government Records Council  
On The 30th Day of April 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 2, 2019
STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL

Findings and Recommendations of the Council Staff
April 30, 2019 Council Meeting

Micaela P. Bennett1 Complainant

v.

West Orange Board of Education (Essex)2 Custodial Agency

Records Relevant to Complaint: Electronic copies of the investigative report, findings, and recommendations by Chiesa, Shahinian & Giantomasi (redacted to protect privacy).

Custodian of Record: John Calavano
Request Received by Custodian: September 13, 2018
Response Made by Custodian: September 18, 2018
GRC Complaint Received: September 25, 2018

Background3

Request and Response:

On September 12, 2018, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On September 18, 2018, the Custodian responded in writing denying access to the responsive records as a personnel record. N.J.S.A. 47:1A-10; Fenichel v. City of Ocean City (Cape May), GRC Complaint No. 2009-71 (November 2009). Further, the Custodian denied access to the records on the basis that same were exempt under the attorney-client privilege and attorney work product doctrine. N.J.S.A. 47:1A-1.1; Mulero v. Town of Morristown, GRC Complaint No. 2005-57 (September 2005).

Denial of Access Complaint:

On September 25, 2018, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant disputed the Custodian’s denial of access, noting that the responsive records were the result of questions raised by the Superintendent Jeffrey S. Rutzky’s “employment history, applications for certifications, applications for employment, and resumes.” The Complainant stated that herself and others (“concerned citizens”)

1 No legal representation listed on record.
2 Represented by Bradley D. Tishman, Esq. of Cleary, Giacobbe, Alfieri, Jacobs, LLC (Oakland, NJ).
3 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.

Micaela P. Bennett v. West Orange Board of Education (Essex), 2018-209 – Findings and Recommendations of the Council Staff
raised such issues for about the last year, which prompted the West Orange Board of Education (“BOE”) to inform the public that it retained an investigator. The Complainant stated that investigators met with the concerned citizens and others, rendered a preliminary report in July 2018, and issued a final report on August 16, 2018.

The Complainant argued that the personnel exemption did not apply here. The Complainant contended that the investigation centered on the Superintendent’s alleged misrepresentations and omissions in advance of his employment with the BOE. The Complainant argued that similar to how applications and resumes are not covered as personnel records under OPRA, the records in question address the Superintendent’s pre-employment “fraud to induce employment.” The Complainant thus contended that Fenichel, GRC 2009-71 was inapposite to the instant complaint.

The Complainant further argued that the records could not be exempt under the attorney-client privilege exemption. The Complainant stated that the BOE was represented by Custodian Counsel’s Firm and not Chiesa, Shahinian & Giantomasi (“Special Counsel”). The Complainant argued that New Jersey courts have long-held that no attorney-client privilege applies to attorneys hired to perform an investigation. Payton v. N.J. Turnpike Auth., 148 N.J. 524 558 (1997); Hansen v. Janitschek, 31 N.J. 545 (1960); Palantini v. Sarian, 15 N.J. Super. 34, 41043 (App. Div. 1951) (but see Harding v. Dana Tranport, Inc., 914 F.Supp. 1084, 1091 (D.N.J. 1996)). The Complainant further argued that the attorney-client privilege was not sacrosanct: it could be pierced based on multiple factors. In re: Kozlov, 79 N.J. 232, 242 (1979).

The Complainant contended that the law is clear that the report was subject to disclosure and not attorney-client privileged. The Complainant also argued that OPRA’s legislative intent supported disclosure so that the public may be advised of whether the findings were consistent with the purported allegations. The Complainant contended that she believed the Custodian denied access because it supported the conclusions reached by the concerned citizens regarding the Superintendent. The Complainant asserted that some of the report was provided to BOE members prior to voting on the Superintendent’s contract. The Complainant also contended exempting access allowed the BOE to avoid public scrutiny.

**Supplemental Response:**

On September 26, 2018, the Custodian provided a supplemental response to the Complainant. Therein, the Custodian reiterated that the BOE was legally precluded from disclosing the responsive “report” for the reasons advanced in his initial response.

**Objections to Representation:**

On October 5, 2018, the Complainant objected to Custodian Counsel’s representation in this matter. The Complainant asserted that Counsel’s Firm drafts OPRA responses for the BOE and is thus a material witness to this complaint. The Complainant noted that the Firm recently stated at a BOE meeting that the Custodian has the final say on disclosure. However, the Complainant asserted that she was informed that the BOE, as a practice, forwarded all OPRA requests to Counsel’s Firm for review and response on the Custodian’s behalf. The Complainant
argued that the Firm, essentially acting as the “strawman,” had inherent conflicts in representing the BOE in this matter.

On October 12, 2018, the Complainant e-mailed the GRC stating that she had not received any response to her representation objections from Counsel. The Complainant requested a determination on her objection for procedural purposes, as the Firm may need to be called as a material witness.

On October 17, 2019, Custodian’s Counsel advised that he recently returned from vacation and would respond to the objections “promptly.” On the same day, the GRC advised that the if the BOE received the Complainant’s objections on October 5, 2018, the final day to respond was October 12, 2018. N.J.A.C. 5:105-2.3(j). The Custodian’s Counsel responded that he left prior to October 5, 2018 and requested an extension until October 24, 2018 to respond, which the GRC granted.

Statement of Information:

On October 18, 2019, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that he received the Complainant’s OPRA request on September 13, 2018. The Custodian certified that he responded in writing on September 18, 2018 denying the request and supplemented his response on September 26, 2018.

The Custodian certified that the record at issue here was an August 14, 2018 report produced by Special Counsel containing the findings, analysis, and recommendations of an investigation into allegations raised against the Superintendent. The Custodian argued that he lawfully denied access to said report for all the reasons stated in his initial response. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-10.

Response for Objections to Representation:

On October 24, 2018, Custodian’s Counsel responded to the Complainant’s objection to his representation in this complaint. Counsel contended that the GRC should reject same because it did not conform to N.J.A.C. 5:105-2.3(i). Counsel contended that the Complainant failed to identify the “representative in question” and did not include “a detailed explanation of the reasons” for her objection. Id. at (i)(2) and (i)(3).

Counsel argued that should the GRC find the objections sufficient, the Complainant failed to meet the exceptionally high standard that any attorney within the Firm was a “necessary witness;” thereby amounting representation in case to a violation of the “Rules of Professional Conduct.” Counsel argued that the Complainant’s arguments were “unfounded and without legal basis.”

Counsel first stated that the Firm represented the BOE in a broad variety of matters, inclusive of OPRA matters. Counsel thus stated that his Firm’s interests were aligned with the BOE and there are no potential conflicts. Counsel also noted that the BOE obtained Special Counsel to conduct the investigation; the Firm did not participate in investigation or preparation.
of the subject report. Counsel thus argued that neither himself nor any employee of the Firm was a “necessary witness” under R.P.C. 3.7.

Second, Counsel argued that the sole issue in this complaint is whether the Custodian unlawfully denied access to the report. Counsel asserted that this is purely a legal issue and not one necessitating testimony. Counsel noted that even if testimony were possible, the Custodian was the only individual who could rightly perform this task. Counsel contended that if the GRC were to disqualify the Firm here, it would be required to disqualify every firm that provided legal advice to custodians in responding to OPRA requests.

Counsel finally stated that to disqualify himself or the Firm, the GRC must “balance competing interests, weighing the need to maintain the highest standards of the profession against the client’s right to freely choose his counsel.” See Stengart v. Loving Care Agency, Inc., 201 N.J. 300, 327 (2010) (Citation and internal quotations omitted). Counsel further averred that the courts have held that objection applications should be viewed in an unfavorable light and disqualification a drastic remedy. Essex Chemical Corp. v. Hartford Accident & Indemnity, Co., 975 F.Supp. 650, 653 (D.N.J. 1997). See also Goodwin Motor Corp. v. Mercedes-Benz of North America, Inc., 172 N.J. Super. 263, 274 (App. Div. 1980) (holding that where no apparent conflict of interest or apparent ethics violation exists, “a trial judge lacks authority to order counsel to withdraw.”).

Counsel contended that no reasons for such a “drastic remedy” exists in this complaint. Counsel further contended that the Complainant failed to meet her heavy burden that disqualification is warranted. Counsel contended that greater harm to the BOE would occur here; the Complainant already presented her case with no need to call the Firm as a witness. Counsel argued the dispute here is purely legal and not factual in any way. Counsel also questioned the Complainant’s allegations given the straightforward nature of this complaint. Counsel asserted that this is especially true given that the Complainant cannot force himself or the Firm to testify on attorney-client privileged communications. N.J.S.A. 2A:84A-20; N.J.R.E. 504; Fellerman v. Bradley, 99 N.J. 493, 499 (1985).

Finally, Counsel contended that even assuming that he was somehow a “necessary witness” here, the Firm would not be precluded from representing the BOE. R.P.C. 3.7; Main Events Productions v. Lacy, 220 F.Supp. 2d 353 (D.N.J. 2002); J.G. Ries & Sons, Inc. v. Spectraserv, Inc., 384 N.J. Super. 216, 230 (App. Div. 2006). Counsel stated that in Oswell v. Morgan Stanley Dean Witter & Co., 2007 WL 2446529 (D.N.J. 2007), the court held that a witness was not “‘truly necessary’ if there are no documents or other witnesses that can be used to introduce the relevant evidence.” Counsel stated that the court thus concluded that “where knowledge possessed by an attorney is equally possessed by other witnesses, disqualification is not appropriate.” Id. Counsel thus contended that foregoing supports that the Firm could not be disqualified here.4

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4 The Complainant subsequently requested an opportunity to respond to Counsel’s October 24, 2018 letter. The GRC advised that its regulations do not afford a sur-response to same and noted that it would review both submissions and “advise the parties accordingly.” Notwithstanding, the Complainant submitted a sur-response via e-mail on October 25, 2018.
Analysis

Objections to Representation


GRC regulations promulgated under the APA and OPRA provide “procedures for the consideration of complaints filed pursuant to [OPRA].” N.J.A.C. 5:105-1.1. This includes a process for challenging a complainant’s or custodian’s legal representative. N.J.A.C. 5:105-2.3(i)-(j), N.J.A.C. 2.4(j)-(k). Specifically:

Objections to a party's representative by another party, and a party's response thereto, to the complaint must be in writing, presented to the Council, served on all parties, and include:

1. The Council's case reference name and number;
2. Clear identification of the representative in question; and
3. A detailed explanation of the reasons for the objections, or conversely the response to such objections.

[N.J.A.C. 5:105-2.3(i).]

A party may respond to any challenge to its representative within five business days of receipt of the challenge.

[N.J.A.C. 5:105-2.3(j).]

Notwithstanding the process set forth above, the remainder of the regulations are silent on the mechanism by which the Council has the authority to render a decision on disqualification of a party’s representative: the Uniform Administrative Procedure Rules address such an issue.

In any case where the issue of an attorney's ethical or professional conduct is raised, the judge before whom the issue has been presented shall consider the merits of the issue raised and make a ruling as to whether the attorney may appear or continue...
representation in the matter. The judge may disqualify an attorney from participating in a particular case when disqualification is required by the Rules of Professional Conduct or the New Jersey Conflict of Interest Law. If disciplinary action against the attorney is indicated, the matter shall be referred to the appropriate disciplinary body.

[N.J.A.C. 1:1-5.3.]

Here, the Complainant has objected to Custodian Counsel’s representation, asserting that he is a “necessary witness” in this complaint as a de facto custodian. Custodian’s Counsel, after obtaining an extension, responded that the objections should not be accepted on two (2) bases. First, Counsel argued that the Complainant submitted an insufficient objection. Second, Counsel contended that there was no evidence in the record warranting disqualification on the basis that he (or any member of the Firm) was a “necessary witness.”

As a threshold determination, the GRC disagrees that the Complainant’s objection submission was insufficient. The Complainant identified the appropriate complaint and clearly identified the Firm as the “representative in question.” Also, the Complainant provided a detailed explanation as to why she believed the Firm (inclusive of Custodian’s Counsel) should be removed from representation.

To settle this issue, adjudicative facts are needed and are best determined in the context of an administrative hearing. There, an administrative law judge will hear testimony of the parties’ witnesses and make credibility determinations based on the respective testimonies. Referral of the matter to the Office of Administrative Law (“OAL”) therefore ensures that due process principles will be effectuated.

Accordingly, this complaint should thus be referred to the OAL for a determination on the Complainant’s objection to representation and appropriate action as applicable. N.J.A.C. 5:105-1, et seq.; N.J.A.C. 1:1-5.3.

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.

Here, the Complainant argued that the Custodian unlawfully denied her access to the responsive report under the personnel and attorney-client privilege/attorney work product exemptions. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-10. In the SOI, the Custodian contended that he lawfully denied access to the responsive report based on the relevant statutes and case law provided for in his initial and supplement responses. However, and for purposes of efficacy, the OAL should address this issue once it has determined the objection to representation issue.
Therefore, and for the purpose of efficacy, this complaint should be referred to the OAL for a determination as to whether the Custodian unlawfully denied access to the responsive report. N.J.S.A. 47:1A-6. Should the OAL find that an unlawful denial of access occurred, it shall order disclosure and determine whether the Custodian knowing and willfully denied access to same.

**Conclusions and Recommendations**

The Council Staff respectfully recommends the Council find that:

1. This complaint should thus be referred to the Office of Administrative Law for a determination on the Complainant’s objection to representation and appropriate action as applicable. N.J.A.C. 5:105-1, et seq.; N.J.A.C. 1:1-5.3.

2. For the purpose of efficacy, this complaint should be referred to the Office of Administrative Law for a determination as to whether the Custodian unlawfully denied access to the responsive report. N.J.S.A. 47:1A-6. Should the OAL find that an unlawful denial of access occurred, it shall order disclosure and determine whether the Custodian knowing and willfully denied access to same.

Prepared By: Frank F. Caruso  
Acting Executive Director

April 23, 2019