



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

March 30, 2021 Government Records Council Meeting

Jamie Epstein, Esq. (o/b/o C.B.)
Complainant

Complaint No. 2018-257

v.

Hopewell Crest Board of Education (Cumberland)
Custodian of Record

At the March 30, 2021 public meeting, the Government Records Council (“Council”) considered the March 23, 2021 Supplemental 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 this complaint should be dismissed because the Complainant withdrew same in writing via e-mail and pursuant to a “Stipulation of Settlement” on March 5, 2021. Thus, no further adjudication is required.

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 March 2021

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: April 1, 2021



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

Reconsideration
**Supplemental Findings and Recommendations of the Executive Director
March 30, 2021 Council Meeting**

**Jamie Epstein, Esq. (On Behalf of C.B.)¹
Complainant**

GRC Complaint No. 2018-257

v.

**Hopewell Crest Board of Education (Cumberland)²
Custodial Agency**

Records Relevant to Complaint: Electronic or paper copies of the following:³

1. Financial records of C.B., to include bills, invoices, receipts, ledger accounts, purchase orders, payments, and cancelled checks (both sides) between July 1, 2016 and present.
2. Academic files of C.B. kept by special education or education services between July 1, 2016 and present.
3. Heath record files of C.B. between July 1, 2016 and present.
4. Communications, including e-mails, memoranda, text messages, voicemail, and letters to and from employees, Hopewell Crest Board of Education (“HCBOE”) members, administrators, or contractors regarding C.B. from July 1, 2016 to present.

Custodian of Record: Stephanie Kuntz

Request Received by Custodian: September 4, 2018

Response Made by Custodian: September 13, 2018

GRC Complaint Received: October 30, 2018

Background

July 28, 2020 Council Meeting:

At its July 28, 2020 public meeting, the Council considered the July 21, 2020 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, found that:

1. The Complainant’s OPRA request item No. 1 is valid because it contains sufficient identifiers allowing the Custodian to identify 164 pages of responsive invoices and purchase orders. Burke v. Brandes, 429 N.J. Super. 169, 177 (App. Div. 2012); MAG

¹ The Complainant represents C.B.

² Represented by Alicia D’Anella, Esq., of Comegno Law Group, P.C. (Moorestown, NJ).

³ The Complainant sought additional records that are not at issue in this complaint.

- Entm't, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005); Bent v. Stafford Police Dep't, 381 N.J. Super. 30, 37 (App. Div. 2005); N.J. Builders Ass'n 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). Further, the Complainant's OPRA request item No. 4 seeking "correspondence," inclusive of e-mails, text messages, and written correspondence, is valid because it contains adequate criteria as addressed in Burke, 429 N.J. Super. at 177-78 and Elcavage v. West Milford Twp. (Passaic), GRC Complaint No. 2009-07 (April 2010). Thus, the Custodian failed to bear her burden of proving a lawful denial of access pursuant to N.J.S.A. 47:1A-6. The Custodian must, after performing a sufficient search, disclose to the Complainant all records responsive to these request items to the Complainant, with redactions where applicable. If the Custodian has already disclosed said records or finds that none exist for one or the other OPRA request item, she must certify to this fact.
2. The Custodian unlawfully denied access to the Complainant's OPRA request item Nos. 2 and 3. N.J.S.A. 47:1A-6. Specifically, the Complainant qualified as an excepted person under N.J.A.C. 6A:32-7.5(e)(14), (g) and was thus entitled to receipt of C.B.'s academic and health records. L.R. v. Camden City Pub. Sch. Dist., 452 N.J. Super. 56, 86-87 (App. Div. 2017). Thus, the Custodian must either 1) disclose the 564 pages of "student records" responsive to these request items; or 2) certify that same were disclosed to the Complainant in response to the subject OPRA request.
 3. **The Custodian shall comply with conclusion Nos. 1 and 2 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, if applicable. Further, the Custodian shall simultaneously deliver⁴ certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,⁵ to the Executive Director.⁶**
 4. 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.
 5. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

⁴ The certified confirmation of compliance, including supporting documentation, may be sent overnight mail, regular mail, e-mail, facsimile, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives it by the deadline.

⁵ "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."

⁶ Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

Procedural History:

On July 29, 2020, the Council distributed its Interim Order to all parties. On August 3, 2020, Custodian's Counsel requested additional time to comply with the Council's Order based on the search necessary to locate records responsive to the subject OPRA request. Counsel also asked whether it was possible to submit a response to the Order without "mooting" HCBOE's ability to file a request for reconsideration. On August 5, 2020, the GRC granted an extension of time to respond to the Council's Interim Order. Specifically, the GRC granted an extension until August 12, 2020 for OPRA request item Nos. 1, 2, and 3, while it also granted an extension until September 14, 2020 for OPRA request item No. 4.

On August 12, 2020, Custodian's Counsel simultaneously provided the Custodian's first response to the Interim Order and filed a request for reconsideration of the Council's based on a mistake. Regarding the request for reconsideration, Counsel contended that the Council erred in determining that OPRA request item No. 1 was invalid. Shipyard Assoc., L.P. v. City of Hokoben, 2015 N.J. Super. Unpub. LEXIS 2117, 5 (App. Div. 2015).

On August 17, 2020, the Complainant sought an extension of time to submit objections to the request for reconsideration because the parties were in settlement discussions. On August 19, 2020, the GRC granted an extension of time to submit objections under September 9, 2020.

Additional Submissions:

On September 14, 2020, the GRC e-mailed the parties seeking an update on the status of settlement discussions. On the same day, Custodian's Counsel noted that discussions are ongoing, but that HCBOE intended to submit its second Interim Order response on time. The Complainant also responded confirming that settlement negotiations remained on-going. Later on September 14, 2020, Custodian's Counsel submitted its second Interim Order response.

On October 21, 2020, the GRC e-mailed the parties again seeking a status update. On the same day, the Complainant advised that the parties reached a settlement "in principle" but could not reduce that to a written agreement.⁷

On February 12, 2021, Custodian's Counsel e-mailed the GRC stating that the parties reached a resolution and asked for direction on the proper procedures for dismissing this complaint. On the same day, the Complainant e-mailed the parties advising that a settlement had not yet been consummated. On February 17, 2021, the GRC e-mailed the parties acknowledging receipt of the parties' e-mails. The GRC advised the parties that it would accept a fully executed agreement or written notification from the Complainant that he wished to withdraw the complaint. The GRC noted that this complaint would continue through the adjudication process "unless and until otherwise alerted to a withdraw."

⁷ The Complainant subsequently stated that he would submit objections; however, the GRC advised him that the extended time frame to do so expired on September 9, 2020 and that such a submission would not be accepted. Jamie Epstein, Esq. (On Behalf of C.B.) v. Hopewell Crest Board of Education (Cumberland), 2018-257 – Supplemental Findings and Recommendations of the Executive Director 3

On March 5, 2021, the Complainant e-mailed the GRC advising that settlement had been reached. The Complainant stated that pursuant to the attached “Stipulation of Settlement,” he was voluntarily dismissing this complaint with prejudice.

Analysis

No analysis required.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council that this complaint should be dismissed because the Complainant withdrew same in writing via e-mail and pursuant to a “Stipulation of Settlement” on March 5, 2021. Thus, no further adjudication is required.

Prepared By: Frank F. Caruso
Executive Director

March 23, 2021



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

INTERIM ORDER

July 28, 2020 Government Records Council Meeting

Jamie Epstein, Esq. (o/b/o C.B.)
Complainant

Complaint No. 2018-257

v.

Hopewell Crest Board of Education (Cumberland)
Custodian of Record

At the July 28, 2020 public meeting, the Government Records Council (“Council”) considered the July 21, 2020 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 Complainant’s OPRA request item No. 1 is valid because it contains sufficient identifiers allowing the Custodian to identify 164 pages of responsive invoices and purchase orders. Burke v. Brandes, 429 N.J. Super. 169, 177 (App. Div. 2012); MAG Entm’t, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005); Bent v. Stafford Police Dep’t, 381 N.J. Super. 30, 37 (App. Div. 2005); N.J. Builders Ass’n 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). Further, the Complainant’s OPRA request item No. 4 seeking “correspondence,” inclusive of e-mails, text messages, and written correspondence, is valid because it contains adequate criteria as addressed in Burke, 429 N.J. Super. at 177-78 and Elcavage v. West Milford Twp. (Passaic), GRC Complaint No. 2009-07 (April 2010). Thus, the Custodian failed to bear her burden of proving a lawful denial of access pursuant to N.J.S.A. 47:1A-6. The Custodian must, after performing a sufficient search, disclose to the Complainant all records responsive to these request items to the Complainant, with redactions where applicable. If the Custodian has already disclosed said records or finds that none exist for one or the other OPRA request item, she must certify to this fact.
2. The Custodian unlawfully denied access to the Complainant’s OPRA request item Nos. 2 and 3. N.J.S.A. 47:1A-6. Specifically, the Complainant qualified as an excepted person under N.J.A.C. 6A:32-7.5(e)(14), (g) and was thus entitled to receipt of C.B.’s academic and health records. L.R. v. Camden City Pub. Sch. Dist., 452 N.J. Super. 56, 86-87 (App. Div. 2017). Thus, the Custodian must either 1) disclose the 564 pages of “student records” responsive to these request items; or 2) certify that same were disclosed to the Complainant in response to the subject OPRA request.
3. **The Custodian shall comply with conclusion Nos. 1 and 2 above within five (5) business days from receipt of the Council’s Interim Order with appropriate**

redactions, including a detailed document index explaining the lawful basis for each redaction, if applicable. Further, the Custodian shall simultaneously deliver¹ certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,² to the Executive Director.³

4. 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.
5. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Interim Order Rendered by the
Government Records Council
On The 28th Day of July 2020

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: July 29, 2020

¹ The certified confirmation of compliance, including supporting documentation, may be sent overnight mail, regular mail, e-mail, facsimile, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives it by the deadline.

² "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."

³ Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
July 28, 2020 Council Meeting**

**Jamie Epstein, Esq. (On Behalf of C.B.)¹
Complainant**

GRC Complaint No. 2018-257

v.

**Hopewell Crest Board of Education (Cumberland)²
Custodial Agency**

Records Relevant to Complaint: Electronic or paper copies of the following:³

1. Financial records of C.B., to include bills, invoices, receipts, ledger accounts, purchase orders, payments, and cancelled checks (both sides) between July 1, 2016 and present.
2. Academic files of C.B. kept by special education or education services between July 1, 2016 and present.
3. Heath record files of C.B. between July 1, 2016 and present.
4. Communications, including e-mails, memoranda, text messages, voicemail, and letters to and from employees, Hopewell Crest Board of Education (“HCBOE”) members, administrators, or contractors regarding C.B. from July 1, 2016 to present.

Custodian of Record: Stephanie Kuntz

Request Received by Custodian: September 4, 2018

Response Made by Custodian: September 13, 2018

GRC Complaint Received: October 30, 2018

Background⁴

Request and Response:

On August 28, 2018, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. The Complainant included in his OPRA request an executed “Delegation of Education Record Rights” from C.B.’s parent. On September 13, 2018, the Custodian responded in writing denying access to the request under applicable federal and State statutes. Family Educational Rights and Privacy Act (“FERPA”) (20 U.S.C. § 1232g); N.J.S.A. 47:1A-9(a); N.J.A.C. 6A:32-7.5(a). The Custodian further asserted that

¹ The Complainant represents C.B.

² Represented by Alicia D’Anella, Esq., of Comegno Law Group, P.C. (Moorestown, NJ).

³ The Complainant sought additional records that are not at issue in this complaint.

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 Executive Director the submissions necessary and relevant for the adjudication of this complaint.

Jamie Epstein, Esq. (On Behalf of C.B.) v. Hopewell Crest Board of Education (Cumberland), 2018-257 – Findings and Recommendations of the Executive Director

OPRA request item No. 4 was invalid because it failed to identify a specific sender/recipient. Elcavage v. West Milford Twp. (Passaic), GRC Complaint No. 2009-07 (April 2010). The Custodian finally stated that OPRA was not the appropriate method to seek access to a child's education record; rather, the Complainant should seek access under FERPA. The Custodian thus requested that the Complainant advise whether HCBOE should construe the OPRA request as a request for educational records under FERPA.

Denial of Access Complaint:

On October 30, 2018, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant contended that the records responsive to his OPRA request are "government records" as defined under N.J.S.A. 47:1A-1.1. The Complainant further contended that the Custodian unlawfully denied access to the records sought here. L.R. v. Camden City Pub. Sch. Dist., 452 N.J. Super. 56, 95 (2017) (certif. granted 233 N.J. 222 (2018)). The Complainant further argued that no exemptions within OPRA exist for public elementary and secondary educational student records. The Complainant noted that OPRA also does not defer to FERPA as a valid denial.

The Complainant contended that N.J.S.A. 47:1A-9(a) provides that OPRA recognizes exemptions in other federal or state statutes. See O'Boyle v. Borough of Longport, 218 N.J. 168, 185 (2014). The Complainant asserted that notwithstanding, there is no support in any other laws banning C.B. from obtaining his own record. The Complainant argued that while FERPA and State educational laws obligate schools to protect student records, it also guarantees that C.B. should have access to his own educational records. The Complainant further averred that both FERPA and the New Jersey Department of Education's ("NJDOE") regulations provide exceptions that allow certain individuals to access a student's educational record, including those with parental consent or a court order. 20 U.S.C. § 1232g(b)(2); N.J.A.C. 6A:32-7.5(e)(14)-(15).

The Complainant argued that should the Council find in his favor and order disclosure; he should be considered a prevailing party entitled to an award of attorney's fees. N.J.S.A. 47:1A-6; Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008); K.L. v. Evesham Twp. Bd. of Educ., 423 N.J. Super. 337, 364 (App. Div. 2011).

Statement of Information:⁵

On April 26, 2019, the Custodian filed a Statement of Information ("SOI"). The Custodian certified that she received the Complainant's OPRA request on September 4, 2018. The Custodian certified that she did not perform a search for records responsive to OPRA request item Nos. 1 and 4 because would have required research for which she was not required to perform. The Custodian further affirmed that she was able to identify the records responsive to OPRA request item Nos. 2 and 3. The Custodian certified that she responded in writing on September 13, 2018 denying the request under OPRA and sought clarification as to whether the Complainant sought access to C.B.'s education record under FERPA. The Custodian noted that she estimated that as many as

⁵ On November 23, 2018, this complaint was referred to mediation. On April 3, 2019, this complaint was referred back to the GRC for adjudication.

728 pages of records are responsive to the subject OPRA request, not including any records that may be responsive to OPRA request item No. 4.

The Custodian argued that the Complainant's OPRA request item No. 1 was invalid because it required research. MAG Entm't, LLC v. Div. of ABC, 375 N.J. Super. 534, 549 (App. Div. 2005); N.J. Builders Ass'n v. N.J. Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007). The Custodian argued that assuming "services" applied to special education services, said research would include determining which C.B. received from HCBOE through his individual education program ("IEP"). The Custodian argued that she would then need to identify all providers and locate responsive financial records for each. The Custodian further argued that said research would result in location of and disclosure of confidential student information exemption from disclosure under OPRA. N.J.S.A. 47:1A-9(a); 20 U.S.C. 1232(g); N.J.A.C. 6A:32-2.1.⁶ The Custodian noted that she identified 164 pages of invoices and purchase orders potentially responsive to this OPRA request item; however, they were not particular to any one student but for services to all HCBOE's special education attendees. The Custodian thus argued that attempting to single out each service specific to C.B. would require research.

The Custodian contended that the records responsive to the Complainant's OPRA request item Nos. 2 and 3 were exempt from disclosure under FERPA and DOE regulations. 20 U.S.C. 1232g; N.J.A.C. 6A:32-2.1; 7.5(a). The Custodian noted that while the Complainant included an authorization, submitting an OPRA request was "neither necessary nor appropriate for educational records, as both . . . FERPA and [DOE's] regulations" established a process and procedure for accessing student records. The Custodian asserted that it was with this understanding that she sought clarification from the Complainant as to whether she should construe his request as one under FERPA. The Custodian further argued that clarification was important to understand whether "academic file" and "health file" meant "education records" or "student records." The Custodian argued that the Complainant chose to file this complaint as opposed to providing clarification. The Custodian asserted that the GRC has previously held that a custodian did not deny access where they sought clarification and received no response. The Custodian noted that she identified 564 pages of responsive records encompassing C.B.'s educational records.

The Custodian noted that on November 14, 2018, C.B.'s mother sought the same student records directly from the HCBOE and received them in their entirety on November 19, 2018. The Custodian argued that at no point did the HCBOE intend to deny access; rather, her request for clarification was an attempt to understand what was sought and through what process. The Custodian noted that not only did the Complainant fail to clarify the request, he also failed to acknowledge the subsequent disclosure. The Custodian argued that in light of the forgoing, it is clear that this matter constituted frivolous litigation intended solely to obtain attorney's fees. The Custodian argued that FERPA does not allow for attorney's fees and the Complainant should not be permitted to use OPRA in order to obtain same.

⁶ The Custodian identified a disclosure that occurred while this complaint was in mediation. The GRC notes that pursuant to the Uniform Mediation Act, N.J.S.A. 2A:23C-1 *et seq.*, communications that take place during the mediation process are not deemed to be public records subject to disclosure under OPRA. N.J.S.A. 2A:23C-2. All communications that occur during the mediation process are privileged from disclosure and may not be used in any judicial, administrative, or legislative proceeding, or in any arbitration, unless all parties and the mediator waive the privilege. N.J.S.A. 2A:23C-4.

The Custodian finally contended that the Complainant's OPRA request item No. 4 was invalid because it failed to identify a specific sender/recipient and subject matter. Elcavage, GRC 2009-07. The Custodian argued that rather than identify individuals, the Complainant used generic parties encompassing the HCBOE's entire staff. The Custodian argued that the request item was also invalid because it "impermissibly [sought] communications." The Custodian argued that requiring her to respond to this request item would substantially disrupt agency operations. The Custodian asserted that based on this, she asked the Complainant to narrow his request item to identify senders/recipients. The Custodian noted that the number of potentially responsive records was unknown because the request was overly broad.

Additional Submissions:

On June 7, 2019, the Complainant submitted a letter brief refuting the SOI.⁷ The Complainant argued that FERPA did not provide for access; rather, it regulates public schools' methods for protecting student records. See L.R., 452 N.J. Super. at 75. The Complainant further noted that FERPA only works to withhold federal funding from noncompliant schools. The Complainant argued that the Custodian erroneously denied access under FERPA because he was an authorized requestor and FERPA did not allow for a private right of action to obtain student records. See Gonzaga Univ. v. Doe, 536 U.S. 273, 122 (2002).

The Complainant contended that he did not seek access to "a student's academic file," but instead to "the requestor's own academic file." The Complainant argued that this distinction is important because both K.L., 423 N.J. Super. 337 and L.R., 452 N.J. Super. 56 held that a requestor, or their representative, was entitled to their own child's educational records. The Complainant also contended that instead of clarification, the Custodian denied the OPRA request and required him to submit a new request under FERPA. The Complainant also argued that the Custodian did not include a copy of her SOI document index as part of the original September 13, 2018 response. The Complainant further argued that the Custodian failed to note that a majority of all records sought were provided to him or his client.⁸

The Complainant argued that these disclosures were proof that the subject OPRA request was valid and no research was required. The Complainant asserted that, with respect to OPRA request item No. 1, C.B. is a special education student and that the HCBOE was required to give C.B. a case manager. The Complainant further stated that N.J.A.C. 6A:14-3.2 required all special education purchases to go through the case manager, special education director, and HCBOE secretary. The Complainant contended that the Custodian could have easily identified responsive records based on the term "services."

The Complainant noted that the Custodian did not seek clarification prior to denying the OPRA request. The Complainant contended that the Custodian's attempts to change her denial

⁷ The Complainant included an explanation of actions occurring while this complaint was in mediation. As noted above, communications that take place during the mediation process are not deemed to be public records subject to disclosure under OPRA. N.J.S.A. 2A:23C-2. All communications that occur during the mediation process are privileged from disclosure and may not be used in any judicial, administrative, or legislative proceeding, or in any arbitration, unless all parties and the mediator waive the privilege. N.J.S.A. 2A:23C-4.

⁸ The Complainant noted that these disclosures occurred in mediation.

into a “clarification” were erroneous. The Complainant argued that trying to determine whether he sought records under FERPA or OPRA was rendered moot through the signed authorization. The Complainant noted that a similar signed authorization was accepted by the courts in L.R. 452 N.J. Super. 56. The Complainant further argued that the Custodian knew that C.B. had waived any FERPA restrictions, but instead attempted to get C.B. to waive her OPRA right.

Finally, the Complainant contended that the Custodian unlawfully denied OPRA request item No. 4 as invalid. The Complainant contended that HCBOR previously provided C.B. with 168 pages of e-mails in response to an August 19, 2017 OPRA request devoid of a sender or recipient. The Complainant further contended that the GRC’s reliance on Elcavage, 2009-07 is onerous and “based on an ancient time in the short history of the age of technology.” The Complainant argued that this is especially true given the Supreme Court’s recent decision in Paff v. Galloway Twp., 229 N.J. 340 (2017). The Complainant thus argued that the Elcavage criteria deserves to be reexamined and loosened to reflect a newer capability to perform keyword searches. See also MuckRock, LLC. v. CIA, 300 F.Supp. 3D 108, 136 (D.D.C. 2018). The Complainant requested that the GRC order the Custodian to disclose all responsive internal communications and determine that he is a prevailing party under OPRA. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008).

Analysis

Validity of Request

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, 375 N.J. Super. at 546 (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 v Stafford Police Dep’t, 381 N.J. Super. 30, 37 (App. Div. 2005);⁹ N.J. Builders, 390 N.J. Super. at 180; 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.*) and requires a custodian to conduct research. MAG, 375 N.J. Super. 534; Donato v. Twp. of Union, GRC Complaint No. 2005-182 (January 2007). 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 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).

In Inzelbuch v. Lakewood Bd. of Educ. (Ocean), GRC Complaint No. 2013-97 (Interim Order dated January 28, 2014), the complainant sought several records over two (2) OPRA requests. Among those items in the December 4, 2012 OPRA request, the complainant sought “any and all contracts” and “those vendors” providing certain services to the Lakewood Board of Education. The custodian denied access to the requested item as invalid because it failed to “specify a readily identifiable document.” The Council agreed, holding that the requested item was invalid because it required research. The Council noted that the requested item only identified the record with a broad generic description and contained no time frame. See also Moreira v. Elizabeth Bd. of Educ. (Union), GRC Complaint No. 2015-313 (Interim Order dated April 24, 2018).

However, in Burke v. Brandes, 429 N.J. Super. 169 (App. Div. 2012), the court held that the defendant “performed a search and was able to locate records responsive . . .” which “. . . belied any assertion that the request was lacking in specificity or was overbroad.” Id. at 177. See also Gannett v. Cnty. of Middlesex, 379 N.J. Super. 205 (App. Div. 2005) (holding that “[s]uch a voluntary disclosure of most of the documents sought . . . constituted a waiver of whatever right the County may have had to deny Gannett's entire OPRA request on the ground that it was improper.” Id. at 213). Generally, in situations where a request was overly broad on its face but the custodian nonetheless was able to locate records, the Council has followed Burke in determining that the request contained sufficient information for record identification. See Bond v. Borough of Washington (Warren), GRC Complaint No. 2009-324 (Interim Order dated March 29, 2011); Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2010-302 (Interim Order dated January 31, 2012).

In the instant complaint, the Complainant’s OPRA request item No. 1 sought “financial records” of C.B. between July 1, 2016 and the date of the request. The Complainant went on to identify “financial records” as “bills, invoices, receipts, ledger accounts, purchase orders, payments, and cancelled checks.” The Custodian initially denied access to the request as one

⁹ Affirmed on appeal regarding Bent v. Stafford Police Department, GRC Case No. 2004-78 (October 2004).
Jamie Epstein, Esq. (On Behalf of C.B.) v. Hopewell Crest Board of Education (Cumberland), 2018-257 – Findings and Recommendations of the Executive Director

seeking “educational records,” but later argued in the SOI that the item was invalid. However, the Custodian also identified 164 pages of potentially responsive records. The Custodian noted that these records were not specific to C.B.; rather, they comprised the services offered to all HCBOE special education attendees. Subsequent to the SOI, the Complainant contended that the Custodian’s ability to locate responsive records betrayed the argument that request item No. 1.

While OPRA request item No. 1 is similar to the request in Inzelbuch that the Council found invalid, the Custodian’s acknowledgement that she located 164 potentially responsive records requires an outcome consistent with the tenet of Burke. That is, the Custodian’s argument that the request item was invalidated is belied by her ability to locate responsive invoices and purchase orders related to special education services. For this reason, the GRC is persuaded that the request item provided enough specificity for which the Custodian could identify responsive records and was thus valid.

Regarding requests for communications, including e-mails, text messages, and written correspondence, the GRC has established criteria deemed necessary under OPRA to request them. 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 e-mail, (2) the specific date or range of dates during which the e-mail(s) were transmitted, and (3) the identity of the sender and/or the recipient thereof. See also Sandoval v. NJ State Parole Bd., GRC Complaint No. 2006-167 (Interim Order March 28, 2007). The Council has also applied the criteria set forth in Elcavage to other forms of correspondence, such as letters. See Armenti v. Robbinsville Bd. of Educ. (Mercer), GRC Complaint No. 2009-154 (Interim Order May 24, 2011).

Moreover, the Burke, court found a request for “EZ Pass benefits afforded to retirees of the Port Authority, including all . . . correspondence between the Office of the Governor . . . and the Port Authority” to be valid under OPRA because it “was confined to a specific subject matter that was clearly and reasonably described with sufficient identifying information . . . [and] was limited to particularized identifiable government records, namely, correspondence with another government entity, rather than information generally.” Id. at 172, 176. The court noted that the complainant had “narrowed the scope of the inquiry to a discrete and limited subject matter,” and that fulfilling the request would involve “no research or analysis, but only a search for, and production of,” identifiable government records. Id. at 177-78.

Here, the Complainant’s OPRA request item No. 4 sought “communications” between HCBOE employees, Board members, administrators, and contractors regarding C.B. from July 1, 2016 to present. The Custodian initially denied access to the request as invalid and subsequently advanced this position in the SOI. The Custodian contended that the Complainant failed to identify with specificity those senders/recipients and any search would result in a substantial disruption of agency operations. In response to the SOI, the Complainant contended that HCBOE had previously provided several e-mails to C.B. in response to a similar OPRA request. The Complainant also argued that the Council’s decision in Elcavage should be updated to confirm with post-decision technological advances making it easier to search for records electronically.

In reviewing the Complainant’s OPRA request item No. 4, the GRC is persuaded that it is valid. The request identified senders and recipients, the subject and/or content, and a definitive

time frame, as required by Elcavage. Further, and contrary the Custodian's sender/recipient argument, the Burke court validated a similar type of request that did not identify each specific, individual sender/recipient, stating that the request was narrowly construed. Also, it is not unreasonable that the Custodian could easily identify e-mails and other correspondence sent from the identified parties based on letterhead, digital signatures, or e-mail suffixes. In fact, the Council's decision in Verry v. Borough of South Bound Brook (Somerset), GRC Complaint no. 2013-43 *et seq.* (Interim Order dated September 24, 2013), offers clarifying guidance on a custodian's obligation to search for correspondence:

[A] valid OPRA request requires a search, not research. An OPRA request is thus only valid if the subject of the request can be readily identifiable based on the request. Whether a subject can be readily identifiable will need to be made on a case-by-case basis. When it comes to e-mails or documents stored on a computer, a simple keyword search may be sufficient to identify any records that may be responsive to a request. As to correspondence, a custodian may be required to search an appropriate file relevant to the subject. In both cases, emails and correspondence, a completed "subject" or "regarding" line may be sufficient to determine whether the record relates to the described subject. Again, what will be sufficient to determine a proper search will depend on how detailed the OPRA request is, and will differ on a case-by-case basis. What a custodian is not required to do, however, is to actually read through numerous e-mails and correspondence to determine if same is responsive: in other words, conduct research.

[Id. at 5-6.]

Based on the forgoing precedential case law, it is reasonable that the Custodian could have located responsive records based on a practical search. Thus, the GRC concludes that the sender/recipient portion of OPRA request item No. 4 is sufficient.¹⁰

Accordingly, the Complainant's OPRA request item No. 1 is valid because it contains sufficient identifiers allowing the Custodian to identify 164 pages of responsive invoices and purchase orders. Burke, 429 N.J. Super. at 177; MAG, 375 N.J. Super. at 546; Bent, 381 N.J. Super. at 37; N.J. Builders, 390 N.J. Super. at 180; Schuler, GRC 2007-151. Further, the Complainant's OPRA request item No. 4 seeking "correspondence," inclusive of e-mails, text messages, and written correspondence, is valid because it contains adequate criteria as addressed in Burke, 429 N.J. Super. at 177-78 and Elcavage, GRC 2009-07. Thus, the Custodian failed to bear her burden of proving a lawful denial of access pursuant to N.J.S.A. 47:1A-6. The Custodian must, after performing a sufficient search, disclose to the Complainant all records responsive to these request items to the Complainant, with redactions where applicable. If the Custodian has already disclosed said records or finds that none exist for one or the other OPRA request item, she must certify to this fact.

¹⁰ The GRC notes that it need not address the Complainant's request to revisit the Elcavage criteria because he has not advanced a viable argument requiring the GRC to augment that decision. The bright line criteria set forth in Elcavage offers a clear and concise policy on that information required to allow a custodian to perform a sufficient search, whether electronically or otherwise. The criteria also do not inhibit a custodian's ability to utilize current technology to perform a more focused search.

Jamie Epstein, Esq. (On Behalf of C.B.) v. Hopewell Crest Board of Education (Cumberland), 2018-257 – Findings and Recommendations of the Executive Director

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.

OPRA also provides that:

The provisions of [OPRA] shall 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).]

The regulations of the State Board of Education and the Commissioner define a “student record” as “. . . information related to an individual student *gathered within or outside the school district and maintained within the school district*, regardless of the physical form in which it is maintained.” N.J.A.C. 6A:32-2.1 (emphasis added). The regulations of the State Board of Education and the Commissioner of Education provide that “[o]nly authorized organizations, agencies or persons as defined herein shall have access to student records . . .” to include “persons from outside the school if they have written consent of the parent . . .” N.J.A.C. 6A:32-7.5(e)(14). Finally, the regulations require that “[i]n complying with this section, individuals shall adhere to requirements pursuant to [OPRA] and [FERPA].” N.J.A.C. 6A:32-7.5(g). To this end, the Council has looked to these exceptions in determining whether a complainant can access “student records” in part or whole under OPRA. See *i.e. Martinez v. Edison Bd. of Educ. (Middlesex)*, GRC Complaint No. 2014-126 (May 2015); but see *Inzelbuch v. Lakewood Bd. of Educ. (Ocean)*, GRC Complaint No. 2014-92 (September 2014).

More recently, the Appellate Division addressed OPRA and the disclosure of “student records” in L.R. v. Camden City Pub. Sch. Dist., 452 N.J. Super. 56 (App. Div. 2017).¹¹ In one of the four (4) consolidated cases, the trial court ordered the school district to disclose student records requested under OPRA, with redactions made to all personally identifying information (“PII”). The Appellate Division held that redacting PII from a document does not remove its classification as a “student record.” Id. at 83. The court found that “N.J.A.C. 6A:32-7.5(g)’s does not expressly incorporate FERPA’s provisions for the redaction of PII into the [New Jersey Pupil Records Act (“NJPR”)] or its regulations. Moreover, nothing in the NJPRA or its regulations states that sufficiently anonymized documents, with all PII removed, are no longer “student records” under N.J.A.C. 6A:32-1.” Id. at 85.

¹¹ The GRC notes that the Complainant represented plaintiff in L.R. Jamie Epstein, Esq. (On Behalf of C.B.) v. Hopewell Crest Board of Education (Cumberland), 2018-257 – Findings and Recommendations of the Executive Director

The court further discussed the interplay between the NJPRA, FERPA and OPRA:

It is reasonable to conclude that N.J.A.C. 6A:32-7.5(g) centrally concerns functionality—a district's *processing* of student record requests from an authorized person or organization. See K.L., supra, 423 N.J. Super. at 350, 32 A.3d 1136 (“In providing access to school records in accordance with N.J.A.C. 6A:32-7.5, school districts must also comply with the requirements of OPRA and FERPA, N.J.A.C. 6A:32-7.5(g).”). For instance, if a school district receives an OPRA request from an authorized person or organization listed under N.J.A.C. 6A:32-7.5(e), then it must process that request in compliance with OPRA and FERPA requirements. Nothing in the plain language of N.J.A.C. 6A:32-7.5(g), however, supersedes or nullifies the limitations of “authorized” parties, as set forth at N.J.A.C. 6A:32-7.5(a) and (e). Hence, we agree with the judge in the Hillsborough case that a requestor cannot gain access to a student record unless the requestor satisfies one of the “[a]uthorized” categories listed in N.J.A.C. 6A:32-7.5(e)(1) through (16).

[Id. at 86-87 (emphasis in original).]¹²

In the matter before the Council, the Complainant submitted his OPRA request inclusive of a signed authorization form from C.B. parent. Notwithstanding, the Custodian denied access to the OPRA request and requiring the Complainant to seek access to the records under FERPA. This complaint ensued, wherein the Complainant argued that he fell within the exceptions set forth under FERPA and DOE’s regulations regarding access to student records. In the SOI, the Custodian maintained the position that submitting an OPRA request for a student record was inappropriate. The Custodian further argued that she located 564 pages of records responsive to OPRA request item Nos. 2 and 3, which HCBOE provided to C.B.’s mother as part of a separate request in November 2018. The Custodian finally argued that the Complainant went through OPRA to obtain attorney’s fees; FERPA did not include a fee-shifting provision.

Initially, the GRC notes that the L.R. court was clear that the existence of other statutes regarding the management and disclosability of student records does not infringe on an individual’s right to submit a request under OPRA for those records. In fact, DOE’s regulations expressly provide such an option by requiring districts to adhere to OPRA and FERPA. N.J.A.C. 6A:32-7.5(g); L.R., 452 N.J. Super. at 87. Based on this, the Custodian’s attempts to push the Complainant to use FERPA were inconsistent with the plain reading of OPRA, DOE’s regulations, and L.R., 238 N.J. 547.

Further, a plain reading of DOE’s regulations answers the question of whether the Complainant may gain access to the requested records. Specific to this complaint is the exception for “persons from outside the school if they have written consent of the parent . . .” is relevant. N.J.A.C. 6A:32-7.5(e)(14). In advance of submitting the subject OPRA request, the Complainant received written permission from C.B.’s parent. The Complainant subsequently attached this

¹² The Supreme Court of New Jersey subsequently affirmed by equal division noting that “N.J.A.C. 6A:32-7.5(g) confirms that individuals and entities may request student records in accordance with OPRA’s provisions, and that educational agencies must comply with those provisions when they respond to such requests.” L.R. v. Camden City Pub. Sch. Dist., 238 N.J. 547, 569 (2019).

Jamie Epstein, Esq. (On Behalf of C.B.) v. Hopewell Crest Board of Education (Cumberland), 2018-257 – Findings and Recommendations of the Executive Director

signed “Delegation of Education Record Rights” to the subject OPRA request. Notwithstanding the attached waiver, the Custodian denied access under OPRA and required the Complainant to pursue his request through FERPA. A plain reading of the student record exceptions contained in N.J.A.C. 6A:32-7.5(e) and the basic tenets of disclosure discussed in L.R. clearly show that the Complainant, with definitive “written consent of the parent” fell within an applicable exception allowing for disclosure. Thus, the GRC finds that it is logical to conclude that the Custodian unlawfully denied access to C.B.’s educational records.

Accordingly, the Custodian unlawfully denied access to the Complainant’s OPRA request item Nos. 2 and 3. N.J.S.A. 47:1A-6. Specifically, the Complainant qualified as an excepted person under N.J.A.C. 6A:32-7.5(e)(14), (g). and was thus entitled to receipt of C.B.’s academic and health records. L.R., 452 N.J. Super. at 86-87. Thus, the Custodian must either 1) disclose the 564 pages of “student records” responsive to these request items; or 2) certify that same were disclosed to the Complainant in response to the subject OPRA request.

Knowing & Willful

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.

Prevailing Party 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. The Complainant’s OPRA request item No. 1 is valid because it contains sufficient identifiers allowing the Custodian to identify 164 pages of responsive invoices and purchase orders. Burke v. Brandes, 429 N.J. Super. 169, 177 (App. Div. 2012); MAG Entm’t, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005); Bent v. Stafford Police Dep’t, 381 N.J. Super. 30, 37 (App. Div. 2005); N.J. Builders Ass’n 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). Further, the Complainant’s OPRA request item No. 4 seeking “correspondence,” inclusive of e-mails, text messages, and written correspondence, is valid because it contains adequate criteria as addressed in Burke, 429 N.J. Super. at 177-78 and Elcavage v. West Milford Twp. (Passaic), GRC Complaint No. 2009-07 (April 2010). Thus, the Custodian failed to bear her burden of proving a lawful denial of access pursuant to N.J.S.A. 47:1A-6. The Custodian must, after performing a sufficient search, disclose to the Complainant all records responsive to these request items to the Complainant, with redactions where applicable. If the Custodian has already disclosed said records or finds that none exist for one or the other OPRA request item, she must certify to this fact.

2. The Custodian unlawfully denied access to the Complainant's OPRA request item Nos. 2 and 3. N.J.S.A. 47:1A-6. Specifically, the Complainant qualified as an excepted person under N.J.A.C. 6A:32-7.5(e)(14), (g). and was thus entitled to receipt of C.B.'s academic and health records. L.R. v. Camden City Pub. Sch. Dist., 452 N.J. Super. 56, 86-87 (App. Div. 2017). Thus, the Custodian must either 1) disclose the 564 pages of "student records" responsive to these request items; or 2) certify that same were disclosed to the Complainant in response to the subject OPRA request.
3. **The Custodian shall comply with conclusion Nos. 1 and 2 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, if applicable. Further, the Custodian shall simultaneously deliver¹³ certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,¹⁴ to the Executive Director.**¹⁵
4. 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.
5. 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: Frank F. Caruso
Executive Director

July 21, 2020

¹³ The certified confirmation of compliance, including supporting documentation, may be sent overnight mail, regular mail, e-mail, facsimile, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives it by the deadline.

¹⁴ "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."

¹⁵ Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

Jamie Epstein, Esq. (On Behalf of C.B.) v. Hopewell Crest Board of Education (Cumberland), 2018-257 – Findings and Recommendations of the Executive Director