



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

June 28, 2022 Government Records Council Meeting

Micaela P. Bennett
Complainant

Complaint No. 2018-265

v.

West Orange Board of Education (Essex)
Custodian of Record

At the June 28, 2022 public meeting, the Government Records Council (“Council”) considered the June 21, 2022 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 two (2) sets of unapproved, draft closed session minutes constituted “inter-agency or intra-agency advisory, consultative, or deliberative material” and were exempt from disclosure under OPRA. N.J.S.A. 47:1A-1.1; *Libertarians for Transparent Gov’t v. Gov’t Records Council*, 453 N.J. Super. 83 (App. Div. 2018); *Parave-Fogg v. Lower Alloways Creek Twp.*, GRC Complaint No. 2006-51 (August 2006). Therefore, the Custodian did not unlawfully deny access to these records. N.J.S.A. 47:1A-6.
2. The responsive Chiesa, Shahinian, & Giontomasi report is exempt from disclosure as a “personnel record” under N.J.S.A. 47:1A-10 pursuant to judicial notice taken of the Council’s prior decision in *Bennett v. West Orange Bd. of Educ. (Essex)*, GRC Complaint No. 2018-265 (August 2021). Thus, the Custodian lawfully denied access to the report. N.J.S.A. 47:1A-6.
3. The Custodian did not unlawfully deny to the portion of the Complainant’s OPRA request seeking Superintendent Rutsky’s “date of separation and reason therefor.” N.J.S.A. 47:1A-6. Specifically, the Custodian disclosed Superintendent Rutsky’s resignation letter, which contains that information. Further, the Custodian was under no obligation to include circumstances, motivations, or causes beyond those that existed in disclosable “government records.” *Libertarians for Transparent Gov’t v. Ocean Cnty. Prosecutor’s Office*, 2018 N.J. Super. Unpub. LEXIS 25, 12, 14 (App. Div. 2018)(cert. denied 235 N.J. 407 (2018)).

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

at the State of New Jersey Government Records Council, 101 South Broad Street, PO Box 819,
Trenton, NJ 08625-0819.

Final Decision Rendered by the
Government Records Council
On The 28th Day of June 2022

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: June 30, 2022

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
June 28, 2022 Council Meeting**

**Micaela P. Bennett¹
Complainant**

GRC Complaint No. 2018-265

v.

**West Orange Board of Education (Essex)²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of all closed session minutes, memoranda of understanding, or settlement agreements on “Employee [No.] 7228,” the “date of separation and reason therefor,” and the associated Chiesa, Shahinian, & Giontomasi (“CSG”) investigation report(s).

Custodian of Record: John Calavano
Request Received by Custodian: October 25, 2018
Response Made by Custodian: November 2, 2018
GRC Complaint Received: November 13, 2018

Background³

Request and Response:

On October 25, 2018, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On November 2, 2018, the Custodian responded in writing addressing the request as follows.

- Regarding closed session minutes, the West Orange Board of Education (“WOBOE”) interpreted the subject request to seek only those closed session minutes relating to the separation agreement. To this end, the Custodian disclosed the September 26, 2018 closed session minutes (one (1) page) with redactions for attorney-client privileged material. The Custodian further noted that minutes for the October 15, 2018 and October 19, 2018 meeting were exempt because they had not “been approved for public release.”
- Regarding the separation agreement, the Custodian disclosed the Separation of Employment Agreement (thirty-one (31) pages) redacting Superintendent Jeff Rutzky’s home address. N.J.S.A. 47:1A-1.

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

- Regarding the date of separation and reason therefore, the Custodian disclosed Superintendent Rutzky's October 19, 2018 resignation letter.
- Regarding the CSG report, the Custodian referred the Complainant to his response to a prior OPRA request⁴ seeking CSG reports (denying access under the personnel exemption at N.J.S.A. 47:1A-10. See Fenichel v. City of Ocean City (Cape May), GRC Complaint No. 2009-71 (November 2009)).

Denial of Access Complaint:

On November 13, 2018, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant asserted that her and two (2) other members of the public have repeatedly expressed concerns about Superintendent Rutzky's work history and failure to disclose a criminal conviction, among other issues. The Complainant stated that after making publicly disparaging comments against her and the others, WOBOE retained CSG to investigate the Superintendent. The Complainant stated that the CSG investigation concluded in August 2018 and reports were sent to WOBOE shortly thereafter. The Complainant stated that she submitted an OPRA request to obtain the reports but was denied and subsequently filed a Denial of Access Complaint.⁵ The Complainant averred that thereafter, WOBOE negotiated with Superintendent Rutzky and entered into a Settlement Agreement requiring his resignation.

The Complainant asserted that following an October 19, 2018 WOBOE meeting where Superintendent Rutzky officially agreed to resign pursuant to the Agreement, she submitted the subject OPRA request and was again denied access to multiple records. The Complainant contended that the public had a right to know if a public employee engaged in misconduct that resulted in their resignation. The Custodian argued that the WOBOE's action of "cloaking the real reasons for separation" in a closed session and the subsequent denial of access decreases transparency and trustworthiness. The Complainant further contended that by incorporating Executive Order No. 11 (Gov. Byrne, 1974) in OPRA, and based on the Supreme Court's holding in S. Jersey Pub. Co., Inc. v. N.J. Expressway Auth., 124 N.J. 478 (1991), the public is entitled to the "actual reason" a public employee resigned.

The Complainant contended that contrary to OPRA and S. Jersey, 124 N.J. 478, the WOBOE fought against transparency by denying access to the CSG reports and meeting minutes involving the real reasons why Superintendent Rutzky agreed to resign from his position. The Complainant further asserted that WOBOE's handling of Superintendent Rutzky's resignation may have allowed him to depart with additional evidence of misconduct between himself and elected officials within the Township of West Orange.

The Complainant contended that OPRA was enacted to not allow public agencies to hide misconduct away from the public. The Complainant argued that rather than be transparent, WOBOE chose to defame her and then deny access to the very information she could use to defend herself. The Complainant argued that the relief sought here is "simple": disclosure of the CSG reports and all minutes where WOBOE discussed the "real reasons" Superintendent Rutzky was

⁴ That OPRA request was the subject of Bennett v. West Orange Bd. of Educ. (Essex), GRC Complaint No. 2018-209 (August 2021).

⁵ Ibid.

permitted to resign. The Complainant further requested that the GRC view the denial as knowingly and willfully “motivated by some nefarious intent to withhold information from the public.”

Supplement Response:

On November 14, 2018, the Custodian responded in writing stating that he previously denied access to the October 15, and 19, 2018 closed session minutes on the basis that they were not yet approved. The Custodian stated that the minutes were subsequently approved; thus, he was disclosing them. The Custodian requested that the Complainant withdraw the portion of the complaint addressing the closed session minutes on Superintendent Rutzky.

Statement of Information:

On January 8, 2019, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that he received the Complainant’s OPRA request on October 25, 2018. The Custodian certified that he responded in writing on November 2, 2018 providing access to multiple records with redactions and denied access to the requested CSG reports. The Custodian affirmed that he responded again on November 14, 2018 disclosing two (2) additional sets of closed session minutes that were approved at a recent WOBOE meeting.

The Custodian argued that he properly disclosed the September 26, 2018 closed session minutes relating to Superintendent Rutzky’s separation from the WOBOE while withholding the other two (2) sets of minutes that were not yet approved for “public release.” The Custodian further argued that he properly redacted attorney-client privileged information within the September 26, 2018 minutes. The Custodian also noted that he disclosed the other two (2) sets of minutes to the Complainant upon their approval by the WOBOE and asked the Complainant to withdraw this portion of the complaint: she did not do so. The Custodian contended that the Council need not address the issue because he disclosed all minutes the Complainant sought in her OPRA request. The Custodian also argued that to the extent that the Complainant sought additional responsive minutes, this portion of the request was invalid. See Ray v. Freedom Acad. Charter Sch. (Camden), GRC Complaint No. 2009-185 (Interim Order dated August 24, 2010); Valdes v. Union City Bd. of Educ. (Hudson), GRC Complaint No. 2011-147, *et seq.* (July 2012); Scheeler, Jr. v. Woodbine Bd. of Educ. (Cape May), GRC Complaint No. 2014-77 (February 2015).

The Custodian next argued that he properly denied access to the requested CSG report. Fenichel, GRC 2009-71. The Custodian further argued that Payton v. N.J. Turnpike Auth., 148 N.J. 524 (1997) did not apply here because unlike the attorney investigator there, CSG performed traditional legal services for the WOBOE. The Custodian certified that the report included not only factual findings, but a “myriad of recommendations and legal advice to the [WOBOE].” The Custodian noted that upon request, he would “gladly provide” the CSG report to the GRC for an *in camera* review. The Custodian further asserted that the separation agreement does not dissolve the report’s exempt status. The Custodian also took exception to the Complainant assertion that the WOBOE denied access to the report with “nefarious intent;” the report is exempt from disclosure under OPRA based on “controlling law.”

The Custodian finally argued that he satisfied the portion of the Complainant's OPRA request seeking the "date of separation and reason therefor" by disclosing the October 19, 2018 resignation letter. The Custodian contended that the Complainant misapplied S. Jersey, 124 N.J. 478 and that he was not required to provide a "more detailed explanation" of the reasons for resignation. The Custodian asserted that WOBOE's position is supported by Libertarians for Transparent Gov't v. Ocean Cnty. Prosecutor's Office, 2018 N.J. Super. Unpub. LEXIS 25 (App. Div. 2018)(cert. denied 235 N.J. 407 (2018)), where the Appellate Division held that "the plain reading of [N.J.S.A. 47:1A-10] does not support . . . that the [Ocean County Prosecutor's Office] was obligated to provide information concerning the circumstances surrounding Doe's decision to resign or his motivation for doing so." Id. at 13. The Custodian noted that the Ocean Cnty. court specifically distinguished S. Jersey from the facts on review, which are also directly applicable here. The Custodian thus contended that the WOBOE was not required to disclose information from CSG's investigation or circumstances leading to Superintendent Rutzky's resignation.

Analysis

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.

Draft Meeting Minutes

Regarding draft meeting minutes, the Council has previously determined same are exempt from disclosure pursuant to OPRA. In Parave-Fogg v. Lower Alloways Creek Twp., GRC Complaint No. 2006-51 (August 2006), the Council held that ". . . the Custodian has not unlawfully denied access to the requested meeting minutes as the Custodian certifies that at the time of the request said minutes had not been approved by the governing body and as such, they constitute inter-agency or intra-agency advisory, consultative, or deliberative [{"ACD"}] material and are exempt from disclosure. . ." citing N.J.S.A. 47:1A-1.1. See also Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2008-106 (February 2009); Wolosky v. Stillwater Twp. (Sussex), GRC Complaint No. 2009-30 (January 2010).

In Libertarians for Transparent Gov't v. Gov't Records Council, 453 N.J. Super. 83 (App. Div. 2018), the Appellate Division discussed the deliberative process privilege at length regarding a request for draft meeting minutes, stating:

The applicability of the deliberative process privilege is government by a two-prong test. The judge must determine both that a document is (1) "pre-decisional," meaning it was "generated before the adoption of an agency's policy or decision," and (2) deliberative, in that it "contain[s] opinions, recommendations, or advice about agency policies." [Educ. Law Ctr. v. Dep't of Educ., 198 N.J. at 276 (quoting

Integrity, 165 N.J. at 83)]. If a document stratifies both prongs, it is exempt from disclosure under OPRA pursuant to the deliberative process privilege.

[Id. at 89-90.]

Regarding the first prong, the court stated that “a draft is not a final document. It has been prepared for another person or persons’ editing and eventual approval.” Id. at 90. Therefore, the court held that by their very nature, draft meeting minutes are pre-decisional since they are subject to revision and not yet approved for public release. Id. at 90-91.

Regarding the second prong, the court held that “the document must be shown to be closely related to the ‘the formulation or exercise of . . . policy-oriented judgment or [to] the process by which policy is formulated.’” Ciesla v. N.J. Dep’t of Health & Sr. Servs., 429 N.J. Super. 127,138 (App. Div. 2012) (quoting McGee v. Twp. of E. Amwell, 416 N.J. Super. 602, 619-20 (App. Div. 2010)). Id. at 91. The court found that the requested draft minutes, as compiled by the writer in attendance at the meeting, were subject to additions, suggestions, and other edits from the members of the public body. Id. Thus, the draft minutes satisfied the second prong of the test. Id. at 92.

Here, the Custodian disclosed one (1) set of closed session minutes but identified two (2) others as exempt from disclosure because they had not “been approved for public release” at the time of the subject OPRA request. In the Denial of Access Complaint, the Complainant contended that she was entitled to all minutes where WOBOE discussed the “real reasons” Superintendent Rutzky was permitted to resign. In the SOI, the Custodian maintained his argument that the two (2) sets of minutes withheld were not yet approved by WOBOE. The Custodian noted that he disclosed both sets of minutes on November 14, 2018 after their approval.

Precedential case law supports a custodian’s denial of access to meeting minutes in draft form and prior to approval of a governing body under the ACD exemption. N.J.S.A. 47:1A-1.1; Libertarians, 453 N.J. Super. 83. Here, compelling evidence has been presented that two (2) of the three (3) identified sets of closed session minutes were in draft form at the time of the subject OPRA request. Thus, it follows that said minutes were not disclosable and that a lawful denial of access occurred.

Accordingly, the two (2) sets of unapproved, draft closed session minutes constituted ACD material and were exempt from disclosure under OPRA. N.J.S.A. 47:1A-1.1; Libertarians, 453 N.J. Super. 83; Parave-Fogg, GRC 2006-51. Therefore, the Custodian did not unlawfully deny access to these records. N.J.S.A. 47:1A-6.

CSG Report

OPRA provides:

[T]he personnel or pension records of any individual in the possession of a public agency, including but not limited to records relating to any grievance filed by or against an individual, shall not be considered a government record and shall not be made available for public access, except that an individual’s name, title, position,

salary, payroll record, length of service, date of separation and the reason therefore, and the amount and type of pension received shall be a government record . . .

[N.J.S.A. 47:1A-10 (emphasis added).]

Additionally, N.J.A.C. 1:1-15.2(a) and (b) state that official notice may be taken of judicially noticeable facts (as explained in N.J.R.E. 201 of the New Jersey Rules of Evidence), as well as of generally recognized technical or scientific facts within the specialized knowledge of the agency or the judge. The Appellate Division has held that it was appropriate for an administrative agency to take notice of an appellant's record of convictions because judicial notice could have been taken of the records of any court in New Jersey, and appellant's record of convictions were exclusively in New Jersey. See Sanders v. Div. of Motor Vehicles, 131 N.J. Super. 95 (App. Div. 1974).

The GRC must take judicial notice of that fact that the disclosability of the CSG report sought here was already addressed in Bennett v. West Orange Bd. of Educ. (Essex), GRC Complaint No. 2018-265 (August 2021). There, the Council referred the complaint to the Office of Administrative Law ("OAL") for a hearing to determine, amongst other issues,⁶ whether the custodian unlawfully denied access to the same exact report. In his August 2, 2021 Initial Decision, the Honorable Barry E. Moscowitz, Administrative Law Judge ("ALJ"), concluded that the custodian properly denied the report under both the attorney-client privilege and personnel exemptions. Id. at 12-14. The Council subsequently adopted the ALJ's Initial Decision at its August 24, 2021 meeting.

Here, the Complainant again sought access to the CSG report following Superintendent Rutzky's official resignation from the WOBOE. The Custodian denied access to the CSG report, citing to N.J.S.A. 47:1A-10 and Fenichel, GRC 2009-71. This complaint followed, wherein the Complainant contended that the WOBOE withheld the report to hide the "real reason" for Superintendent Rutzky's resignation. The Complainant also argued that she had a right to report because: 1) the public had a right to know the reasons behind the resignation; 2) WOBOE may have utilized the report and closed sessions to hide additional misconduct; and 3) she needed the information to defend herself against defamation. In the SOI, the Custodian maintained his position that he lawfully denied access to the CSG report. The Custodian further noted that the WOBOE would not object to an *in camera* review if the Council so ordered.

Notwithstanding the arguments before the Council here, the exempt status of the CSG report has already been decided on in Bennett, GRC 2018-265. That is, the Council adopted the ALJ's conclusion that the report was clearly exempt under the personnel exemption (as well as under the attorney-client and work product privileges). See also Gonzalez v. Cnty. of Hudson, GRC Complaint No. 2011-212 (August 2012) (holding that the custodian lawfully denied access to an investigation report about an employee generated by outside counsel). Further, the GRC finds no new or additional information regarding this issue that warrants a *de novo* review of the disclosability status of the CSG report. Thus, a lawful denial of access has occurred here.

⁶ The Council also tasked the OAL with addressing Complainant's objection to WOBOE's representation. The Complainant did not similarly raise the objection issue in the instant complaint.

Accordingly, the responsive CSG report is exempt from disclosure as a “personnel record” under N.J.S.A. 47:1A-10 pursuant to judicial notice taken of the Council’s prior decision in Bennett, GRC 2018-265. Thus, the Custodian lawfully denied access to the report. N.J.S.A. 47:1A-6.

Date of Separation and Reason Therefor

As noted above, OPRA generally begins with a presumption that personnel records are exempt from disclosure, with certain exceptions to include the “date of separation and reason therefor . . .” N.J.S.A. 47:1A-10.

Here, the Custodian disclosed to the Complainant a settlement agreement with Superintendent Rutsky (redacting only his home address information), as well as his letter of resignation. The Complainant filed this complaint contending that WOBOE failed to provide the “real reasons” for Superintendent Rutsky’s resignation. The Complainant argued that OPRA and S. Jersey, 124 N.J. 478 required the WOBOE to provide specific reasons for the resignation. In the SOI, the Custodian argued that Libertarians, 2018 N.J. Super. Unpub. LEXIS 25, and not S. Jersey, applied here. The Custodian contended that in finding that a custodian was not required to provide circumstantial resignation information, the Libertarians court distinguished S. Jersey from the facts there.

Upon review, the GRC is persuaded that the Custodian disclosed those records identifying the “date of separation and reason therefor” consistent with Libertarians. Thus, while unpublished, Libertarians presents compelling support that no unlawful denial of access occurred. As stated by that court, N.J.S.A. 47:1A-10 “does not require the provision of the circumstances that may have caused an employee to choose to resign, the employee’s motivation for resigning, or anything beyond the reason for the employee’s ‘date of separation.’” Id. at 12. Instead, the Custodian was only required to disclose “what it represented was the sole personnel record showing that Doe separated from employment on a particular date because he resigned.” Id. at 14. In this instance, as was the case in Libertarians, Superintendent Rutsky’s resignation letter clearly contains the “plain language” definition of the “date of separation and reason therefor.” Also, the Libertarian court clearly defined those reasons why S. Jersey, 124 N.J. 478 did not apply with a strong reliance on the fact that said court was not required to determine disclosability under OPRA. Such a reasoning applies here as well, given that the facts of this complaint are like Libertarians and warrant a similar distinction from S. Jersey.

Accordingly, the Custodian did not unlawfully deny to the portion of the Complainant’s OPRA request seeking Superintendent Rutsky’s “date of separation and reason therefor.” N.J.S.A. 47:1A-6. Specifically, the Custodian disclosed Superintendent Rutsky’s resignation letter, which contains that information. Further, the Custodian was under no obligation to include circumstances, motivations, or causes beyond those that existed in disclosable “government records.” Libertarians, 2018 N.J. Super. Unpub. LEXIS 25 at 12, 14.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The two (2) sets of unapproved, draft closed session minutes constituted “inter-agency or intra-agency advisory, consultative, or deliberative material” and were exempt from disclosure under OPRA. N.J.S.A. 47:1A-1.1; Libertarians for Transparent Gov’t v. Gov’t Records Council, 453 N.J. Super. 83 (App. Div. 2018); Parave-Fogg v. Lower Alloways Creek Twp., GRC Complaint No. 2006-51 (August 2006). Therefore, the Custodian did not unlawfully deny access to these records. N.J.S.A. 47:1A-6.
2. The responsive Chiesa, Shahinian, & Giontomasi report is exempt from disclosure as a “personnel record” under N.J.S.A. 47:1A-10 pursuant to judicial notice taken of the Council’s prior decision in Bennett v. West Orange Bd. of Educ. (Essex), GRC Complaint No. 2018-265 (August 2021). Thus, the Custodian lawfully denied access to the report. N.J.S.A. 47:1A-6.
3. The Custodian did not unlawfully deny to the portion of the Complainant’s OPRA request seeking Superintendent Rutsky’s “date of separation and reason therefor.” N.J.S.A. 47:1A-6. Specifically, the Custodian disclosed Superintendent Rutsky’s resignation letter, which contains that information. Further, the Custodian was under no obligation to include circumstances, motivations, or causes beyond those that existed in disclosable “government records.” Libertarians for Transparent Gov’t v. Ocean Cnty. Prosecutor’s Office, 2018 N.J. Super. Unpub. LEXIS 25, 12, 14 (App. Div. 2018)(cert. denied 235 N.J. 407 (2018)).

Prepared By: Frank F. Caruso
Executive Director

June 21, 2022