



State of New Jersey

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September 25, 2003

Government Records Council
Department of Community Affairs
101 South Broad St., 2nd Floor P.O.
Box 819
Trenton, New Jersey 08625

Re: 03-0158--Whether the Government Records Council (GRC) is authorized to penalize a records custodian's attorney under N.J.S.A. 47:1A-7e and N.J.S.A. 47:1A-11a of the Open Public Records Act (OPRA) for advising his client to improperly deny access to requested government records

Dear Members of the Government Records Council:

You have asked whether the GRC is authorized to penalize a records custodian's attorney pursuant to N.J.S.A. 47:1A-7(e) and N.J.S.A. 47:1A-11(a). The question arose from the GRC's investigation of a complaint which suggested that a Board of Education (BOE) attorney advised a public entity client to deny access to records despite the clear statutory indication that the records were not exempt under OPRA. You are advised that the GRC does not have the authority to impose a penalty or sanction attorneys who provide legal advice and counsel to records custodians regarding the disclosure of government records. The

New Jersey Supreme Court has exclusive jurisdiction to regulate attorney conduct pursuant to the powers granted to it in the New Jersey Constitution.

In promulgating OPRA, the Legislature set forth two provisions which address the GRC's authority to impose a penalty for an OPRA violation. N.J.S.A. 47:1A-7(e) states in pertinent part that

[i]f the council determines ... that a custodian has knowingly and willfully violated P.L. 1963, c.73 ... and is found to have unreasonably denied access under the totality of the circumstances, the council must impose the penalties provided for in section 12 of P.L.2001, c.404 (C.47:1A-6).

In addition, the penalty provision at N.J.S.A. 47:1A-11(a) states that

[a] public official, officer, employee or custodian who knowingly and willfully violates P.L.1963, c.73 (C.47:1A-1 et seq.), as amended and supplemented, and is found to have unreasonably denied access under the totality of the circumstances, shall be subject to a civil penalty Appropriate disciplinary proceedings may be initiated against a public official, officer, employee or custodian against whom a penalty has been imposed.

N.J.S.A. 47:1A-7(e) states that the GRC has authority to impose a penalty on custodians. N.J.S.A. 47:1A-11(a) is more expansive in scope than N.J.S.A. 47:1A-7(e) in that it states that penalties may be imposed on public officials, officers, employees and custodians who violate OPRA. It also states that a disciplinary action may be

brought against an official, officer, employee or custodian when a penalty has been imposed. Like N.J.S.A. 47:1A-7(e), N.J.S.A. 47:1A-11(a) does not include attorneys within the scope of the GRC's jurisdiction to impose a penalty.

The clearest indication of a statute's meaning is its plain language. State v. Sutton, 132 N.J. 471, 479(1994). The established rules of statutory construction counsel to first look to the terms of the provision itself. If the terms are unambiguous or unequivocal, a court's responsibility is to give the language its true force and effect. State v. Butler, 89 N.J. 220 (1982). It is clear from examining the plain language of N.J.S.A. 47:1A-7(e) and N.J.S.A. 47:1A-11(a) that the Legislature did not contemplate authorizing the GRC to assess a penalty against attorneys. The Legislature necessarily excluded attorneys from the scope of these provisions because the New Jersey Supreme Court has exclusive constitutional responsibility for regulating attorney conduct. New Jersey Constitution (1947), Article 6, Section 2, Paragraph 3. In fact, the Court promulgated R. 1:20-1 which unequivocally provides that the Court has exclusive disciplinary jurisdiction over attorneys authorized to practice in the State and establishes administrative bodies to prosecute and review alleged attorney misconduct.

In a case where a legislative code imposed restrictions on part-time lawyer/legislative aides that were not as stringent as

the Judiciary's Rules of Professional Conduct, the Supreme Court asserted that neither the Legislature nor the Executive has any power to overrule standards of attorney conduct that the Judiciary has promulgated.

In the Matter of Advisory Committee on Professional Ethics Opinion 621, 128 N.J. 577, 590 (1992). The Court recognized that while the Legislature normally is the proper branch for establishing minimal ethical tenets for employees and officers of the legislative branch, ultimately the Court establishes the standards of conduct to which an attorney is held when the employee or officeholder is a lawyer. Legislation "cannot and does not have the effect of ousting the Judiciary from its exclusive jurisdiction over ... the regulation and discipline of attorneys." *Id.* at 592. Accordingly, as a legislatively-created body, the GRC does not have jurisdiction to regulate attorney conduct under any circumstances. This prohibition includes a matter where a GRC investigation supports a finding that an attorney acted "knowingly and willfully" when he provided legal advice to a records custodian to improperly deny access to government records.*

The GRC lacks jurisdiction to impose a penalty even where the attorney is defined as an official, officer or an employee.

*We do not suggest that the BOE attorney in the case mentioned earlier acted knowingly, willfully or improperly. Our opinion advises only that where an attorney does act in this fashion, the GRC lacks authority to impose a penalty.

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For example, some BOE attorneys are employees either because they are hired as in-house counsel in large districts or because they stipulate in their contract that they will receive a salary in order to be a contributor to the pension system.** N.J.S.A. 18A:1223; N.J.S.A. 18A:16-1. See also School Ethics Commission Advisory Opinion A15-99 (where a BOE attorney employee does not go beyond providing legal advice, he is not considered a "school official" and, therefore, is not required to file a disclosure statement pursuant to the School Ethics Act, N.J.S.A. 18A:12-31.) Similarly, N.J.S.A. 40A:9-139 mandates that the governing body of every municipality shall provide for the appointment of a municipal attorney. A municipal attorney has broad responsibilities to provide legal advice to the governing body and municipal officials on any matter relating to municipal government. Perillo v. Advisory Commission on Professional Ethics, 83 N.J. 366, 371-372 (1980). The position of municipal attorney is deemed an "office." Reilly v. Ozzard, 33 N.J. 529, 542-543 (1960). Deputy attorneys general, who provide legal advice and representation for all departments, boards, bodies, commissions and instrumentalities of state government, are state employees. N.J.S.A. 52:17A-7, -11.

An attorney who is general or special counsel to the board is generally not an officer or employee of the local school board but an employee of the law firm in which he or she practices. The Supreme Court also has jurisdiction over alleged misconduct of these attorneys.

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That the attorneys in these examples are defined as officials, officers or employees is irrelevant in regard to the GRC's authority to impose a penalty or to discipline them. If the attorney in question is the custodian's legal representative and is providing advice and counsel regarding access to government records, he does not become an official under OPRA, and the GRC does not have jurisdiction to impose a penalty. That responsibility is reserved to the Supreme Court. See Taylor v. Hoboken Bd. of Ed., 187 N.J. Super. 546 (App.Div. 1983).

Based on the foregoing, you are advised that the GRC does not have the authority under N.J.S.A. 47:1A-7(e) or N.J.S.A. 47:1A-11(a) to impose a penalty on an attorney who provides legal advice and counsel to a records custodian regarding the disclosure of government records pursuant to an OPRA request. Regulating attorney conduct is exclusively within the jurisdiction of the New Jersey Supreme Court.

Sincerely yours,

PETER C. HARVEY
ATTORNEY GENERAL OF NEW JERSEY

By: _____

Paul P. Josephson, AAG
Director

KAD/e

c: Paul Dice, Acting Executive Director