



State of New Jersey  
GOVERNMENT RECORDS COUNCIL  
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CHRIS CHRISTIE  
Governor

KIM GUADAGNO  
Lt. Governor

LORI GRIFA  
Commissioner

**FINAL DECISION**

**February 24, 2011 Government Records Council Meeting**

Nancy Lewen  
Complainant

Complaint No. 2008-211

v.

Robbinsville Public School District (Mercer)  
Custodian of Record

At the February 24, 2011 public meeting, the Government Records Council (“Council”) considered the February 15, 2011 *Reconsideration* 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. Because the Custodian has established in his motion for reconsideration of the Council’s April 28, 2010 Interim Order that the GRC’s decision is based upon a “palpably incorrect or irrational basis”, said motion for reconsideration is granted. *See Cummings v. Bahr*, 295 N.J. Super. 374 (App. Div. 1996), *D’Atria v. D’Atria*, 242 N.J. Super. 392 (Ch. Div. 1990) and *In The Matter Of The Petition Of Comcast Cablevision Of South Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Television System In The City Of Atlantic City, County Of Atlantic, State Of New Jersey*, 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).
2. Although the e-mail from Kathie Foster to Helen Payne dated November 12, 2007 at 8:13 a.m. was contained in a chain of e-mails which concerned official business of the Robbinsville Public School District, and which were therefore government records as defined in OPRA, the contents of this specific e-mail did not concern official business of the School District and therefore said e-mail constitutes a personal message which was not “made, maintained or kept on file... in the course of official business.” As such, the subject e-mail is not a government record pursuant to *N.J.S.A.* 47:1A.1.1 and is therefore not disclosable under OPRA. *See, e.g., Howell Educ. Ass’n MEA/NEA v. Howell Bd. of Educ.*, 789 N.W.2d 495 (2010), *Schill v. Wis. Rapids Sch. Dist.*, 786 N.W.2d 177 (Wis. 2010), *Denver Publ. Co. v. Bd. of County Comm’rs of Arapahoe County*, 121 P.3d 190 (Colo. 2005), *State of Florida, et als v. City of Clearwater*, 863 S. 2d 149 (Fla. 2003), and *Tiberino v. Spokane County Prosecutor*, 13 P.3d 1104 (Wash. 2000).



3. Although the Custodian failed to provide sufficient information on each document in the redaction index as required, and failed to provide sufficient information on any document because she failed to list the records responsive to the Complainant's OPRA request as required by the GRC, the requested record is not disclosable under OPRA because it is not a government record as defined at N.J.S.A. 47:1A-1.1. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

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 24<sup>th</sup> Day of February, 2011

Robin Berg Tabakin, Chair  
Government Records Council

I attest the foregoing is a true and accurate record of the Government Records Council.

Charles A. Richman, Secretary  
Government Records Council

**Decision Distribution Date: March 1, 2011**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

*Reconsideration*

**Supplemental Findings and Recommendations of the Executive Director  
February 24, 2011 Council Meeting**

**Nancy Lewen**<sup>1</sup>  
**Complainant**

**GRC Complaint No. 2008-211**

v.

**Robbinsville Public School District (Mercer)**<sup>2</sup>  
**Custodian of Records**

**Records Relevant to Complaint:** Copies of e-mails to or from Kathie Foster from December 1, 2006 through August 15, 2008 that contain the word “Lewen” in the body, subject, to, or copy (cc:) portions of the e-mails.

**Request Made:** August 15, 2008

**Response Made:** August 26, 2008

**Custodian:** Robert DeVita, School Business Administrator<sup>3</sup>

**GRC Complaint Filed:** September 18, 2008<sup>4</sup>

**Background**

**April 28, 2010**

At the April 28, 2010 public meeting, the Government Records Council (“Council”) considered the April 1, 2010 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, found that:

1. Because the Custodian’s Counsel on behalf of the Custodian and within the time period provided by the terms of the Council’s Interim Order as extended, (a) certified that all attachments to the e-mails responsive to the request were disclosed to the Complainant on February 20, 2009 except for a few logo graphics which the agency was unable to print, and (b) delivered to the Council in a sealed envelope nine (9) copies of the requested unredacted documents and nine (9) copies of those same records in redacted form to serve as a redaction index, as well as a legal certification that the documents

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

<sup>2</sup> Represented by Thomas Segreto, Esq., of Scarinci Hollenbeck, LLC (Lyndhurst, NJ).

<sup>3</sup> Superintendent of Schools Dr. John Szabo was the original Custodian and responded to the Complainant’s OPRA request on August 26, 2008 before he retired from the agency. Louise B. Davis succeeded Dr. Szabo as the Custodian and was the Custodian at the time the Statement of Information was filed. On or about December 22, 2009, Ms. Davis left the employ of the agency and was replaced by Mr. DeVita, the present Custodian.

<sup>4</sup> The GRC received the Denial of Access Complaint on said date.

provided are the documents requested by the Council for the *in camera* inspection, the Custodian complied in a timely manner with the terms of the Council's December 22, 2009 Interim Order.

2. Because the *in camera* examination of an e-mail from Kathie Foster to Helen Payne dated November 12, 2007 at 8:13 a.m. revealed the Custodian unlawfully denied the Complainant access to said record pursuant to N.J.S.A. 47:1A-6., the Custodian must disclose the unredacted record to the Complainant within five (5) business days of the Council's Interim Order.
3. **On the basis of the Council's determination in this matter, the Custodian shall comply with the Council's Findings of the *In Camera* Examination set forth in paragraph 2 above within five (5) business days from receipt of this Order and simultaneously provide certified confirmation of compliance pursuant to N.J. Court Rules, 1969 R. 1:4-4 (2005) to the Executive Director.**
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.

#### **April 29, 2010**

Council's Interim Order distributed to the parties.

#### **April 30, 2010**

E-mail from the Custodian's Counsel to the Government Records Council ("GRC"). The Custodian's Counsel requests the Council amend its April 28, 2010 Interim Order to eliminate the requirement that the Custodian must disclose an unredacted copy of the e-mail from Kathie Foster to Helen Payne dated November 12, 2007 at 8:13 a.m. ("Record"). Counsel proffers a legal argument in support of such amendment.

#### **April 30, 2010**

E-mail from the GRC to the Custodian's Counsel. The GRC informs Counsel that he must file a request for reconsideration of the Interim Order.

#### **May 3, 2010**

Letter from the Custodian's Counsel to the GRC. The Custodian's Counsel requests a stay and reconsideration of the Council's April 28, 2010 Interim Order. After stating the grounds arguably supporting justification for a stay, Counsel contends that the GRC must reconsider its decision because it erroneously asserted that:

"Although the Custodian certified that she noted the legal basis for each redaction, the GRC was not provided with the specific legal reason for the redactions made to this particular record."<sup>5</sup>

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<sup>5</sup> Supplemental Findings and Recommendations of the Executive Director dated April 28, 2010 at 6. Nancy Lewen v. Robbinsville Public School District (Mercer), 2008-211 – Supplemental Findings and Recommendations of the Executive Director - Reconsideration

The Custodian's Counsel argues that the Council thereafter proceeded to erroneously analyze the reason for the redaction under advisory, consultative and deliberative ("ACD") and student record exemptions, which Counsel argues were never identified as reasons for the redaction to the particular e-mail in question. Counsel asserts that the GRC either did not consider, or failed to appreciate the significance of, probative, competent evidence in the decision making process which must be considered, *to wit*, the Council's decision in Botta v. Borough of Ramsey Clerk, GRC Complaint No. 2003-94 (February 2004). Counsel also cites the New Jersey Department of State, Division of Archives and Records Management ("DARM") circular 03-10-ST, *Managing Electronic Mail: Guidelines and Best Practices*, Section 1.5.1.1.

Counsel asserts that the e-mail in question is a government record and contains segments that are disclosable; however, Counsel argues that the e-mail was redacted to exclude that portion which was a personal communication, the content of which is not used for government purposes. Counsel states that Botta was not cited by the Custodian "as the [GRC] analysis states, for 'retrieval of an e-mail from a remote storage location' but for the proposition that information contained with a government record, the content of which is not used for government purposes, may be redacted." Counsel asserts that, therefore, the GRC either did not appreciate the significance of the Custodian's arguments or decided this matter on a palpably incorrect or irrational basis.

Counsel states that there was no ambiguity in the Statement of Information ("SOI") as to the reasons for the redaction because the Custodian provided the Complainant and the GRC with "a redaction index identifying by a number coded redaction index (sic) the reason for the redaction." Counsel cites Paff v. Department of Labor, 392 N.J. Super. 334 (App. Div. 2007) to define a redaction index as:

"...essentially a "privilege log" that must provide sufficient information "respecting the basis of the privilege-confidentiality-exception claim vis-à-vis each document." Hartz Mountain Indus., Inc. v. N.J. Sports & Exposition Auth., 369 N.J. Super. 175, 185 (App., Div.), certif. denied, 182 N.J. 147 (2004). An accurate index is necessary for substantive review by the requesting party as well as the reviewing court..."

The Custodian's Counsel asserts that "once memorialized in a decision of the GRC, a custodian should be able to rely upon [an advisory opinion] in complaints before the GRC." Counsel further asserts that the Custodian relied upon the Botta decision which contained an advisory opinion pertaining to the issue of the disclosability of "personal information," the content of which is not used for government purposes. Counsel states that in Botta, the custodian sought an advisory opinion from the GRC as to whether an e-mail sent from the Mayor to another employee (advising him that his use of the municipality's e-mail system was inappropriate for personal e-mails) was subject to disclosure. Counsel states that the "GRC responded with three main points:

- 1. an e-mail sent or received on a government computer, the content of which is not used for government purposes, is not a government record and not disclosable;**

2. the use of a home computer does not exempt what is sent or received if it is a government record;
3. If the e-mail is considered a personnel issue it could be part of the personnel record and therefore not disclosable.” (Emphasis added.)

Counsel further states that in the SOI, DARM circular 03-10-ST, *Managing Electronic Mail: Guidelines and Best Practices*, Section 1.5.1.1. was cited because it provided clear guidance as to whether personal information is considered a government record. Counsel quotes Section 1.5.1.1 of circular 03-10-ST as follows:

“...[a]ny e-mail not received or created in the course of state business may be deleted immediately, since it is not an official record. Examples of the type of messages that may be deleted are unsolicited e-mail advertisements, commonly called ‘SPAM,’ personal messages, or the ‘let’s do lunch’ (not a State-business meeting over lunch) or ‘Can I catch a ride?’ type of note.”

The Custodian’s Counsel argues that the Custodian pointed out in the SOI that both the GRC and DARM supported the Custodian’s reasoning for redacting the Record.<sup>6</sup> Further, Counsel argues that the Council’s analysis contains mistakes of fact regarding the Custodian’s reasoning for making the redaction and fails to analyze the appropriateness of the Custodian’s redaction. Counsel asserts that the GRC also failed to explain how the information redacted was used for a government purpose.

#### **May 27, 2010**

E-mail from the Complainant to the GRC. The Complainant states that she is unclear regarding the reconsideration process. The Complainant states that she has a few questions but does not know if it would be appropriate to ask the questions at this time.

#### **May 28, 2010**

E-mail from the GRC to the Complainant. The GRC informs the Complainant that the complaint will remain in *status quo* until the Council acts upon the reconsideration. The GRC also informs the Complainant that she can obtain more information about reconsideration of a Council decision by reviewing *N.J.A.C. 5:105-2.10*, which can be found on the GRC website.<sup>7</sup>

### **Analysis**

#### **Whether the Complainant has met the required standard for reconsideration of the Council’s April 28, 2010 Interim Order?**

Pursuant to *N.J.A.C. 5:105-2.10*, parties may file a request for a reconsideration of any decision rendered by the Council within ten (10) business days following receipt of a

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<sup>6</sup> With respect to the GRC, Counsel is referring to the Council’s decision in *Botta v. Borough of Ramsey Clerk*, GRC Complaint No. 2003-94 (February 2004). The Council addressed DARM circular 03-10-ST and its non-applicability to this complaint in the Supplemental Findings and Recommendations of the Executive Director dated April 28, 2010 at 6, 7.

<sup>7</sup> The website address was provided to the Complainant.

Council decision. Requests must be in writing, delivered to the Council and served on all parties. Parties must file any objection to the request for reconsideration within ten (10) business days following receipt of the request. The Council will provide all parties with written notification of its determination regarding the request for reconsideration. *N.J.A.C. 5:105-2.10(a) – (e)*.

In the matter before the Council, the Council's April 28, 2010 Interim Order was distributed via overnight delivery to the parties on April 29, 2010. Custodian's Counsel submitted a request for a stay and reconsideration of said Order on May 3, 2010. Accordingly, the Custodian's request for a stay and reconsideration of the Council's Interim Order was filed with the GRC one (1) business day from receipt of the Council's decision. The GRC granted Counsel's request for a stay so that the Council could reconsider its decision.

Applicable case law holds that:

“[a] party should not seek reconsideration merely based upon dissatisfaction with a decision.” *D'Atria v. D'Atria*, 242 N.J. Super. 392, 401 (Ch. Div. 1990). Rather, reconsideration is reserved for those cases where (1) the decision is based upon a "palpably incorrect or irrational basis;" or (2) it is obvious that the finder of fact did not consider, or failed to appreciate, the significance of probative, competent evidence. *E.g., Cummings v. Bahr*, 295 N.J. Super. 374, 384 (App. Div. 1996). The moving party must show that the court acted in an arbitrary, capricious or unreasonable manner. *D'Atria, supra*, 242 N.J. Super. at 401. ‘Although it is an overstatement to say that a decision is not arbitrary, capricious, or unreasonable whenever a court can review the reasons stated for the decision without a loud guffaw or involuntary gasp, it is not much of an overstatement.’ *Ibid.*” In The Matter Of The Petition Of Comcast Cablevision Of South Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Television System In The City Of Atlantic City, County Of Atlantic, State Of New Jersey, 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

In support of the Custodian's motion for reconsideration, the Custodian's Counsel asserts that mistakes by the Council require reconsideration of the Council's April 28, 2010 decision. Counsel lists the mistakes the Council made as follows:

1. The GRC erroneously asserted that the GRC was not provided with the specific legal reason for the redactions made to the Record.
2. The GRC erroneously analyzed the reason for the redaction under ACD and student record exemptions which were never identified by the Custodian as reasons for making the redaction.
3. The GRC incorrectly asserted that the Custodian cited *Botta, supra*, for “retrieval of an e-mail from a remote storage location.”
4. The GRC failed to appreciate the significance of the Custodian's argument that information contained within a government record, the content of which is not used for government purposes, may be redacted.

5. The Council’s analysis contains mistakes of fact regarding the Custodian’s reasoning for making the redaction and fails to analyze the appropriateness of the Custodian’s redaction.

Counsel contends that Item No. 1 and 2 above demonstrate that the GRC either did not consider, or failed to appreciate the significance of probative, competent evidence in the decision making process. Counsel further contends that Item No. 3 and 4 above reveal that the GRC either did not appreciate the significance of the Custodian’s arguments or decided this matter on a palpably incorrect or irrational basis. An analysis of each of the enumerated items alleged by Counsel to justify reconsideration follows:

1. The GRC erroneously asserted that the GRC was not provided with the specific legal reason for the redactions made to the Record.

On page six (6) of this complaint’s Supplemental Findings and Recommendations of the Executive Director dated April 28, 2010, the GRC stated, “[a]lthough the Custodian certified that she noted the legal basis for each redaction, the GRC was not provided with the specific legal reason for the redactions made to this particular record.” The Custodian’s Counsel asserted that this GRC statement was erroneous because he contends that the Custodian in the SOI, pursuant to Paff, *supra*, provided a redaction index identifying by a number coded index the reason for the redaction. Specifically, with respect to this Record, the Custodian’s Counsel states:

“[t]his particular redaction was limited to redaction numbered ‘1’ only. That redaction as set forth in the SOI was ‘The GRC has also denied disclosure of e-mails that contained personal information’ and the legal basis was Botta v. Borough of Ramsey Clerk, GRC Complaint No. 2003-94 (February 2004).”

However, the redaction index that the Custodian provided in the SOI, which Counsel relies upon, is incomplete.<sup>8</sup> A table containing the GRC’s inquiries and the Custodian’s corresponding responses to the inquiries follows:

<p><b>(A)</b>  <b>List of all records responsive to Complainant’s OPRA request (include the number of pages for each record).</b></p>	<p>“1. E-mails to or from Kathie Foster that contain any of the following word (sic): ‘Lewen’ in either the body, subject, to or cc: portions of the email from the period beginning on December 1, 2006 through August 15, 2008.”</p>
<p><b>(B)</b>  <b>List the Records Retention Requirement and Disposition Schedule for each records responsive to the Complainant’s OPRA request</b></p>	<p>“There are no retention schedules for electronic communications per se, however, to the extent that the e-mails constitute correspondences (sic), the record series are (sic) 0004-0001 for general with a retention period of 3 years and 0002 for internal with a retention period of 1 year in</p>

<sup>8</sup> Custodian Louise B. Davis prepared the Statement of Information. Nancy Lewen v. Robbinsville Public School District (Mercer), 2008-211 – Supplemental Findings and Recommendations of the Executive Director - Reconsideration



	retention schedule M700101-999.”
<b>(C)</b> <b>List of all records provided to Complainant, in their <u>entirety</u> or <u>with redactions</u> (include the <u>date</u> such records were provided).</b>	“All e-mails responsive to the request were provided with certain delineated redactions numbered and reasons set forth therein.”
<b>(D)</b> <b>If records were disclosed with redactions, give a general nature description of the redactions.</b>	<p>“1) The GRC has also denied disclosure of e-mails that contained personal information.”</p> <p>“2) Information pertaining to students were (sic) redacted.”</p> <p>“3) Names and telephone numbers of all individuals discussed in e-mails as they relate to placement on boards and or advisory committees on the basis that same is (sic) exempt as an advisory, deliberative and/or consultative matter. Additionally, the names were redacted same being exempt under Executive Order 26.”</p>
<b>(E)</b> <b>If records were denied in their entirety, give a general nature description of the record.</b>	“n/a”
<b>(F)</b> <b>List the legal explanation and statutory citation for the denial of access to records in their <u>entirety</u> or <u>with redactions</u>.</b>	<p>“1) <u>Botta v. Borough of Ramsey Clerk</u>, GRC Complaint No. 2003-94 (February 2004) See also Division of Archives and Records Management circular 03-10-ST, Managing Electronic Mail: Guidelines and Best Practices. Section 1.5.1.1.”</p> <p>“2) <u>N.J.A.C. 6:3-6.5</u>.”</p> <p>“3) <u>N.J.S.A. 47:1A-1.1</u> Deliberative and consultative information.”</p>

In Section (A), instead of listing all of the records responsive to the Complainant’s OPRA request as required by the GRC, the Custodian copied the Complainant’s request as it appeared in the Denial of Access Complaint. In her response to the Section (C) inquiry, the Custodian stated that “e-mails responsive to the request were provided with certain redactions numbered and the reasons set forth therein.” However, the Custodian did not state to whom the e-mails were provided.<sup>9</sup> In Section (F) the Custodian provided three (3) legal explanations for making the redactions; however,

<sup>9</sup> The Custodian’s Counsel in the Custodian’s legal argument (Section 12 of the SOI) clarified that the Complainant received the records, along with the described key; however, the Custodian never provided the records to the GRC.

because she failed to list the records responsive to the request in Section (A), the GRC was unable to link a redaction to the Custodian's legal explanation for making said redaction.

Accordingly, the GRC was not provided with the specific legal reason for the redactions made to the record and the GRC did not err by stating in the Supplemental Findings and Recommendations of the Executive Director dated April 28, 2010 that:

“[a]lthough the Custodian certified that she noted the legal basis for each redaction, the GRC was not provided with the specific legal reason for the redactions made to this particular record.”

As such, the conclusion of the Custodian's Counsel that “the GRC either did not consider, or failed to appreciate the significance of probative, competent evidence in the decision making process” with regard to this issue is without merit.

2. The GRC erroneously analyzed the reason for the redaction under ACD and student record exemptions which were never identified by the Custodian as reasons for making the redaction.

The Custodian's Counsel alleged that this error by the GRC also demonstrated that “the GRC either did not consider, or failed to appreciate the significance of probative, competent evidence in the decision making process.”

Counsel, in his January 15, 2010 cover letter forwarding the unredacted record to the GRC, stated:

“[w]e cannot provide a certification from the current Custodian because he will have no personal information or knowledge about this matter. Under the circumstances, we respectfully request the GRC consider the certified statements as contained in the Statement of Information (SOI) and certifications which have addressed this issue.”

Counsel did go on to state in the letter that the redaction of the record was done in accordance with Botta, *supra*, and DARM circular 03-01-ST; however, Counsel did not provide this statement under certification. Counsel stated that a certification as to the redactions performed could be provided to the GRC, but added the caveat that in order for the Custodian to do so, the GRC would have to advise Counsel how he could prepare such a certification “...in light of the fact that this matter has spanned the tenures of three custodians, two of whom no longer are employed by the District and the third, who was not involved and knows nothing about this matter.” The GRC therefore considered the certified statements as contained in the SOI.

As Counsel cited in his request for reconsideration dated May 3, 2010, the court in Paff, *supra*, defined a redaction index as:

“...essentially a “privilege log” that must provide sufficient information “respecting the basis of the privilege-confidentiality-exception claim vis-

à-vis each document.” Hartz Mountain Indus., Inc. v. N.J. Sports & Exposition Auth., 369 N.J. Super. 175, 185 (App., Div.), certif. denied, 182 N.J. 147 (2004). An accurate index is necessary for substantive review by the requesting party as well as the reviewing court...”

However, it is clear that the Custodian in the redaction index did not provide sufficient information on *each* document as required by the court. In fact, the Custodian did not provide sufficient information on any document because she failed to list the records responsive to the Complainant’s OPRA request as required by the GRC.

Because the GRC was unable to correlate a specific legal reason for redaction with the record, the GRC decided to engage in the time consuming process of analyzing the record vis-à-vis all four (4) reasons the Custodian certified for making the redactions. These reasons, as cited by the Custodian were: (1) Botta v. Borough of Ramsey Clerk, GRC Complaint No. 2003-94 (February 2004), (2) Division of Archives and Records Management circular 03-10-ST, Managing Electronic Mail: Guidelines and Best Practices. Section 1.5.1.1, (3) *N.J.A.C.* 6:3-6.5, and (4) ACD material pursuant to N.J.S.A. 47:1A-1.1.

Accordingly, the GRC did not erroneously analyze the reason for the redaction under ACD and student record exemptions; reasons that were never identified by the Custodian as reasons for making the redaction and therefore indicative of the GRC not considering, or failing to appreciate the significance of probative, competent evidence in the decision making process. Rather the GRC, instead of guessing which one of several of the Custodian’s legal explanations for making the redaction was applicable to this specific record, conducted an analysis under *all* of the reasons provided by the Custodian.

Therefore, Counsel’s conclusion that “the GRC either did not consider, or failed to appreciate the significance of probative, competent evidence in the decision making process” with regard to this issue is also without merit.

3. The GRC incorrectly asserted that the Custodian cited Botta, supra, for “retrieval of an e-mail from a remote storage location.”

4. The GRC failed to appreciate the significance of the Custodian’s argument that information contained within a government record, the content of which is not used for government purposes, may be redacted.

Counsel states that the above two (2) reasons further justify reconsideration of the Council’s Order because they demonstrate that the GRC either did not appreciate the significance of the Custodian’s arguments or decided this matter on a palpably incorrect or irrational basis. These assertions by Counsel will be examined together.

The Custodian’s Counsel argues in the request for reconsideration that the Custodian “...cited Botta, not as the [GRC] analysis states, for ‘retrieval of an e-mail from a remote storage location’ but for the proposition that information contained with a government record, the content of which is not used for government purposes, may be redacted.” Here, Counsel’s argument is faulty with respect to both points he tries to

make. First, the GRC did not state that Botta was cited for “retrieval of an e-mail from a remote storage location.” This was taken out of context by the Custodian’s Counsel. Actually the GRC stated that:

“[t]he Custodian cites Botta v. Borough of Ramsey Clerk, GRC Complaint No. 2003-94 (February 2004) for *its inclusion of a GRC response to an inquiry from the custodian* concerning retrieval of an e-mail from a remote storage location.”<sup>10</sup> (Emphasis added.)

Second, Counsel’s allegation that the Custodian cited Botta, *supra*, “for the proposition that information contained with a government record, the content of which is not used for government purposes, may be redacted” is not accurate. The only reference to Botta in the SOI, other than it being named in Section (F) of the document index, is in Counsel’s legal argument (Section 12 of the SOI), which is reproduced in its entirety below:

“With regard to personal information contained in an e-communication, the GRC has addressed this issue in Botta v. Borough of Ramsey Clerk, GRC Complaint No. 2003-94 (February 2004). In Botta, the emails in question contained the Mayor’s (sic) personal opinion about a recent Board of Education election. The e-mail sought was from the Mayor responding to the employee and advising his use of the borough e-mail system was inappropriate for personal e-mails. The custodian requested an advisory opinion from the GRC to determine if it was subject to disclosure. The GRC responded with three main points:

- 1. an e-mail sent or received on a government computer, the content of which is not used for government purposes, is not a government record and not disclosable;**
2. the use of a home computer does not exempt what is sent or received if it is a government record
3. If the e-mail is considered a personnel issue it could be part of the personnel record and therefore not disclosable.” (Emphasis added by Counsel)

Nowhere in the SOI does the Custodian or Custodian’s Counsel argue that the Council’s decision in Botta stands for the proposition that information contained with a government record, the content of which is not used for government purposes, may be redacted. In fact, in Botta, the Council does not even suggest that a portion of a government record may be redacted. The GRC was providing advice about whether an e-mail, under particular circumstances, is a government record and therefore disclosable as such. Those particular circumstances arose because the e-mail was sent from a government employee’s personal computer. Viewed in the context of the Botta

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<sup>10</sup> See the Supplemental Findings and Recommendations of the Executive Director dated April 28, 2010 at 7. The “inclusion of a GRC response to an inquiry from the custodian” is indeed the reason the Botta decision was cited by the Custodian because on page 4 of Counsel’s legal argument (Section 12 of the SOI), Counsel quoted the GRC’s response to the Custodian’s inquiry and it was the only aspect of the Botta decision in Counsel’s argument to which Counsel added bold lettered emphasis.

Statement of Facts (contained in the Findings and Recommendations) this becomes quite clear. In the custodian's response dated July 10, 2003, it states "[t]he custodian replied in writing to Mr. Botta and indicated that there is a disagreement on *whether this e-mail was a public record*. For this reason, the custodian decided to request an advisory opinion from the GRC."<sup>11</sup> (Emphasis added.) Later in the Statement of Facts, it is noted that the Mayor's e-mail to the GRC dated July 11, 2003 states "[t]he mayor...used his home e-mail system and sent the message to the recipient's personal e-mail address. He concluded by posing the question *if his e-mail to his employee was a 'government record'*." (Emphasis added.) On July 14, 2003, the GRC responded to the custodian in pertinent part that "an e-mail sent or received on a government computer, the content of which is not used for government purposes, is not a government record..." The GRC went on to state that it was not disclosable because under OPRA only government records are disclosable.

Counsel argues that "[t]he District never contended that the document was not a government record, but that the document was redacted to exclude that portion which was a personal communication, the content of which is not used for government purposes." Counsel concludes his point by stating that the "...analysis does not begin and end with the determination of whether a particular document is a Government Record." However, the GRC decision Counsel selected to argue makes precisely that point. Counsel is selectively applying GRC comments from the Botta decision to the instant complaint. Counsel is relying on Botta to argue that the record in the instant matter "was redacted to exclude that portion which was a personal communication, the content of which is not used for government purposes." Botta, however, did not consider a "personal communication" but rather a communication sent from a personal computer. The crux of the GRC's opinion in Botta is that, for purposes of OPRA, the means by which the communication is transceived does not matter; the content of the communication matters.<sup>12</sup> And in the instant complaint, there is no dispute between the parties with respect to whether the record is a government record. The Complainant requested the record under OPRA because she was seeking a government record and the Custodian's

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<sup>11</sup> The Council's use of the terminology "advisory opinion" in Botta is a misnomer. When the custodian sought a determination from the GRC regarding whether the e-mail was a government record, the custodian was making an *inquiry*. An "advisory opinion," is expressly defined in N.J.S.A. 47:1A-7.b. as an opinion issued by the GRC, on its own initiative, regarding whether a particular type of record is a government record. What the GRC refers to as an "inquiry" is defined in N.J.S.A. 47:1A-7.b. as a request from any person, including records custodians, to the GRC for information regarding the law governing access to public records. The GRC has a regulation governing advisory opinions that states "[t]he Council shall, in its discretion, issue advisory opinions as to whether a particular type of record is a government record which is accessible to the public pursuant to N.J.S.A. 47:1A-7.b. The regulation also provides that "[a]dvisory opinions address whether general categories of records are disclosable and do not serve as complaint-specific decisions of the Council." See N.J.A.C. 5:105-4.1. Therefore, what the Custodian's Counsel insists is an advisory opinion in Botta is actually an inquiry that was answered by the GRC staff and included within the Statement of Facts section of the decision. Interestingly, the answer to the inquiry had no bearing on the outcome of the decision, which was decided on other grounds. If Counsel was correct that the GRC response to the custodian in Botta was an advisory opinion, it would only have further supported the Council's decision in the instant matter because advisory opinions are limited to opining whether a particular type of record is a government record.

<sup>12</sup> In the Supplemental Findings and Recommendations of the Executive Director dated April 28, 2010, at 7, the GRC made this same point by stating with reference to Botta, "This GRC opinion is pertinent to the issue of whether, based upon content, a given e-mail is a government record."

Counsel asserted in his request for reconsideration that "...[t]he District never contended that the document was not a government record..."

Accordingly, the GRC did not incorrectly assert that the Custodian cited *Botta, supra*, for "retrieval of an e-mail from a remote storage location." Further, the GRC did not fail to appreciate the significance of the Custodian's argument that information contained within a government record, the content of which is not used for government purposes, may be redacted. Rather the GRC was not convinced the Custodian's argument had merit.

Counsel's conclusion therefore that "the GRC either did not appreciate the significance of the Custodian's arguments or decided this matter on a palpably incorrect or irrational basis" with regard to this issue is not viable.

5. The Council's analysis contains mistakes of fact regarding the Custodian's reasoning for making the redaction and fails to analyze the appropriateness of the Custodian's redaction.

The Custodian's argument in the SOI focused generally upon the redaction of selected material in the Record which the Custodian asserted was not used for government purposes and therefore was not a government record subject to disclosure. The Custodian certified in the SOI that the GRC had previously denied disclosure of e-mails that contained personal information. Although the Custodian did not cite any authority for her statement, she was clearly making a *stare decisis* argument.

The issue in this matter, whether an e-mail containing personal matters, created by an employee of a public agency which is sent to another employee of a public agency may be withheld from disclosure under OPRA, is one of first impression before the GRC. Moreover, the e-mail at issue is part of a string of e-mails between public employees which discuss both personal and government business matters.

The GRC has therefore examined similar cases in other jurisdictions for guidance on this novel issue. In *Howell Educ. Ass'n MEA/NEA v. Howell Bd. of Educ.*, 789 N.W.2d 495 (2010), *Leave to appeal denied by, Motion granted by Howell Education Ass'n MEA/NEA v. Howell Bd. of Educ.*, 2010 Mich. LEXIS 2608 (Mich. 2010), the Michigan Supreme Court determined that personal e-mails sent by teachers were not public records under MCL 15.232(e), part of the Freedom of Information Act, simply because they were retained by the public school system; their retention was a blanket saving of all information that did not distinguish between e-mails sent pursuant to educational goals and those sent for personal reasons.

In *Schill v. Wis. Rapids Sch. Dist.*, 786 N.W.2d 177 (Wis. 2010), the Wisconsin Supreme Court determined that teachers' personal e-mails sent from and received by their school district e-mail accounts were not subject to disclosure under Wisconsin Public Records Law because they were personal messages between employees and their friends and families and because the contents of those messages had no connection to a government function.

In Denver Publ. Co. v. Bd. of County Comm'rs of Arapahoe County, 121 P.3d 190 (Colo. 2005), *Rehearing denied by Denver Publ. Co. v. Bd. of County Comm'rs of the County of Arapahoe*, 2005 Colo. LEXIS 940 (Colo., Oct. 17, 2005), the Colorado Supreme Court determined that while personal e-mails between county officials did not fall within constitutional privacy exception to Colorado Open Records Act, the scope of the "public records" definition limited the type of messages covered thereunder and distinguished between messages that related to performance of public functions or receipt and expenditure of public funds and those that did not.

In State of Florida, et als v. City of Clearwater, 863 S. 2d 149 (Fla. 2003), a reporter requested that the city provide copies of all e-mails that were sent or received by two city employees over the city's computer network during a stated period of time. The city provided the reporter with the e-mails deemed public. Thereafter, the company filed an action seeking to obtain all of the e-mails, including the private ones. The trial court denied the request, which was affirmed on appeal, based on a holding that "private" e-mails fell outside the definition of public records. On certification, the court held that private e-mails, as well as the e-mail header information, were not within the definition of public records under the Florida public records law and as such, there was no obligation to grant the request for disclosure. The court analogized the private e-mails to private letters and to holdings relating to e-mails within the judicial branch in arriving at its conclusion. It was noted that there was no showing that private e-mails were kept pursuant to law or in connection with the transaction of official business.

In Tiberino, the appellant was an employee of the respondent county prosecutor's office who was terminated from her employment for unsatisfactory work performance, including her use of e-mail for personal matters; the appellant then threatened litigation. A reporter requested copies of e-mails sent or received on the appellant's work computer pursuant to Washington's public records law. The appellant requested an injunction preventing the release of such e-mails, which was denied by the trial court. The appellant then consolidated an appeal she filed in the state supreme court with the appeal of her denial of the request for an injunction. 13 P. 3d at 1106-07.

The Washington Supreme Court found that under Washington public records law, the e-mails were public records because they were involved in litigation,<sup>[1]</sup> but were exempt from disclosure because their content contained personal information of no public significance. *Id.* at 1110. In doing so, the court noted that:

“[i]n reviewing an agency's action with regard to a public disclosure request, an appellate court must consider the public records act's policy that free and open examination of public records is in the public interest, even though such examination may cause inconvenience or embarrassment. Wash. Rev. Code § 42.17.340(3). To fulfill the statutory purpose, appellate courts are to liberally construe the public records act's

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<sup>[1]</sup> “A ‘public record,’ subject to disclosure under the Act ‘includes [1] any writing [2] containing information relating to the conduct of government or the performance of any governmental or proprietary function [3] prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics.’ Confederated Tribes v. Johnson, 135 Wn.2d 734, 746, 958 P.2d 260 (1998) (quoting RCW 42.17.020(36)).”

disclosure provisions and narrowly construe its exemptions.” [Citations omitted]. *Id.* at 1107.

The court found that the content of Tiberino's e-mails was personal and unrelated to governmental operations, stating that:

“[c]ertainly, the public has an interest in seeing that public employees are not spending their time on the public payroll pursuing personal interests. But it is the amount of time spent on personal matters, not the content of personal e-mails or phone calls or conversations, that is of public interest. The fact that Ms. Tiberino sent 467 e-mails over a 40 working-day time frame is of significance in her termination action and the public has a legitimate interest in having that information. But what she said in those e-mails is of no public significance. The public has no legitimate concern requiring release of the e-mails and they should be exempt from disclosure.” *Id.* at 1110.

OPRA states in pertinent part that:

*"Government record" or "record" means any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof, that has been made, maintained or kept on file in the course of his or its official business by any officer, commission, agency or authority of the State or of any political subdivision thereof, including subordinate boards thereof, or that has been received in the course of his or its official business by any such officer, commission, agency, or authority of the State or of any political subdivision thereof, including subordinate boards thereof. N.J.S.A. 47:1A-1.1.*

Moreover, the purpose of OPRA is “to maximize public knowledge about public affairs in order to ensure an informed citizenry. OPRA requires that all government records be disclosed upon request except those exempted by statute, legislative resolution, administrative regulation, executive order, rules of court, judicial decisions, or federal law.” *Burnett v. County of Gloucester*, 415 *N.J. Super.* 506 (App.Div. 2010).

As in *Tiberino*, although the e-mail at issue herein was sent from a public computer, the contents of the e-mail concerns personal matters rather than matters concerning public affairs. The GRC’s *in camera* review of the e-mail in question reveals that the contents of the e-mail constitute a personal communication between friends and as such, the contents of the e-mail in question contribute nothing to the public’s knowledge about public affairs. Because the e-mail in question constitutes a personal communication, it was not “made, maintained or kept on file... in the course of official business” and is therefore not disclosable under OPRA. *N.J.S.A.* 47:1A-1.1.

The GRC therefore finds that although the e-mail from Kathie Foster to Helen Payne dated November 12, 2007 at 8:13 a.m. was contained in a chain of e-mails which



concerned official business of the Robbinsville Public School District, and which were therefore government records as defined in OPRA, the contents of this specific e-mail did not concern official business of the School District and therefore said e-mail constitutes a personal message which was not “made, maintained or kept on file... in the course of official business.” As such, the subject e-mail is not a government record pursuant to N.J.S.A. 47:1A.1.1 and is therefore not disclosable under OPRA. *See, e.g., Howell Educ. Ass'n, supra, Schill, supra, Denver Publishing Co., supra, State of Florida, supra, and Tiberino, supra.*

As the moving party, the Custodian was required to establish either of the necessary criteria set forth above; namely 1) that the GRC's decision is based upon a "palpably incorrect or irrational basis" or 2) it is obvious that the GRC did not consider the significance of probative, competent evidence. *See Cummings, supra.* The Custodian has so established.

Therefore, because the Custodian has established in his motion for reconsideration of the Council's April 28, 2010 Interim Order that the GRC's decision is based upon a “palpably incorrect or irrational basis” said motion for reconsideration is granted. *See Cummings, supra, D'Atria, supra, and Comcast Cablevision, supra.*

**Whether the Custodian's delay in access to the requested records rises to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances?**

OPRA states that:

“[a] public official, officer, employee or custodian who knowingly or willfully violates [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, shall be subject to a civil penalty ...” N.J.S.A. 47:1A-11.a.

OPRA allows the Council to determine a knowing and willful violation of the law and unreasonable denial of access under the totality of the circumstances. Specifically OPRA states:

“... If the council determines, by a majority vote of its members, that a custodian has knowingly and willfully violated [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, the council may impose the penalties provided for in [OPRA]...” N.J.S.A. 47:1A-7.e.

Certain legal standards must be considered when making the determination of whether the Custodian's actions rise to the level of a “knowing and willful” violation of OPRA. The following statements must be true for a determination that the Custodian “knowingly and willfully” violated OPRA: the Custodian's actions must have been much more than negligent conduct (Alston v. City of Camden, 168 N.J. 170, 185 (2001); the Custodian must have had some knowledge that his actions were wrongful (Fielder v. Stonack, 141 N.J. 101, 124 (1995)); the Custodian's actions must have had a positive

element of conscious wrongdoing (Berg v. Reaction Motors Div., 37 N.J. 396, 414 (1962)); the Custodian's actions must have been forbidden with actual, not imputed, knowledge that the actions were forbidden (Berg); the Custodian's actions must have been intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional (ECES v. Salmon, 295 N.J.Super. 86, 107 (App. Div. 1996)).

Although the Custodian failed to provide sufficient information on each document in the redaction index as required, and failed to provide sufficient information on any document because she failed to list the records responsive to the Complainant's OPRA request as required by the GRC, the requested record is not disclosable under OPRA because it is not a government record as defined at N.J.S.A. 47:1A-1.1. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. Because the Custodian has established in his motion for reconsideration of the Council's April 28, 2010 Interim Order that the GRC's decision is based upon a "palpably incorrect or irrational basis", said motion for reconsideration is granted. *See* Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996), D'Atria v. D'Atria, 242 N.J. Super. 392 (Ch. Div. 1990) and In The Matter Of The Petition Of Comcast Cablevision Of South Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Television System In The City Of Atlantic City, County Of Atlantic, State Of New Jersey, 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).
2. Although the e-mail from Kathie Foster to Helen Payne dated November 12, 2007 at 8:13 a.m. was contained in a chain of e-mails which concerned official business of the Robbinsville Public School District, and which were therefore government records as defined in OPRA, the contents of this specific e-mail did not concern official business of the School District and therefore said e-mail constitutes a personal message which was not "made, maintained or kept on file... in the course of official business." As such, the subject e-mail is not a government record pursuant to N.J.S.A. 47:1A.1.1 and is therefore not disclosable under OPRA. *See, e.g.*, Howell Educ. Ass'n MEA/NEA v. Howell Bd. of Educ., 789 N.W.2d 495 (2010), Schill v. Wis. Rapids Sch. Dist., 786 N.W.2d 177 (Wis. 2010), Denver Publ. Co. v. Bd. of County Comm'rs of Arapahoe County, 121 P.3d 190 (Colo. 2005), State of Florida, et als v. City of Clearwater, 863 S. 2d 149 (Fla. 2003), and Tiberino v. Spokane County Prosecutor, 13 P.3d 1104 (Wash. 2000).

3. Although the Custodian failed to provide sufficient information on each document in the redaction index as required, and failed to provide sufficient information on any document because she failed to list the records responsive to the Complainant's OPRA request as required by the GRC, the requested record is not disclosable under OPRA because it is not a government record as defined at N.J.S.A. 47:1A-1.1. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Prepared By: John E. Stewart, Esq.

Approved By: Catherine Starghill, Esq.  
Executive Director

February 15, 2011



State of New Jersey  
GOVERNMENT RECORDS COUNCIL  
101 SOUTH BROAD STREET  
PO BOX 819  
TRENTON, NJ 08625-0819

CHRIS CHRISTIE  
Governor

KIM GUADAGNO  
Lt. Governor

LORI GRIFA  
Acting Commissioner

**INTERIM ORDER**

**April 28, 2010 Government Records Council Meeting**

Nancy Lewen  
Complainant

Complaint No. 2008-211

v.

Robbinsville Public School District (Mercer)  
Custodian of Record

At the April 28, 2010 public meeting, the Government Records Council (“Council”) considered the April 1, 2010 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:

1. Because the Custodian’s Counsel on behalf of the Custodian and within the time period provided by the terms of the Council’s Interim Order as extended, (a) certified that all attachments to the e-mails responsive to the request were disclosed to the Complainant on February 20, 2009 except for a few logo graphics which the agency was unable to print, and (b) delivered to the Council in a sealed envelope nine (9) copies of the requested unredacted documents and nine (9) copies of those same records in redacted form to serve as a redaction index, as well as a legal certification that the documents provided are the documents requested by the Council for the *in camera* inspection, the Custodian complied in a timely manner with the terms of the Council’s December 22, 2009 Interim Order.
2. Because the *in camera* examination of an e-mail from Kathie Foster to Helen Payne dated November 12, 2007 at 8:13 a.m. revealed the Custodian unlawfully denied the Complainant access to said record pursuant to N.J.S.A. 47:1A-6., the Custodian must disclose the unredacted record to the Complainant within five (5) business days of the Council’s Interim Order.<sup>1</sup>

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<sup>1</sup> **Unless expressly identified for redaction, everything in the record shall be disclosed.** For purposes of identifying redactions, unless otherwise noted a paragraph/new paragraph begins whenever there is an indentation and/or a skipped space(s). The paragraphs are to be counted starting with the first whole paragraph in each record and continuing sequentially through the end of the record. If a record is subdivided with topic headings, renumbering of paragraphs will commence under each new topic heading. Sentences are to be counted in sequential order throughout each paragraph in each record. Each new



3. **On the basis of the Council's determination in this matter, the Custodian shall comply with the Council's Findings of the *In Camera* Examination set forth in paragraph 2 above within five (5) business days from receipt of this Order and simultaneously provide certified confirmation of compliance pursuant to N.J. Court Rules, 1969 R. 1:4-4 (2005) to the Executive Director.**
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.

Interim Order Rendered by the  
Government Records Council  
On The 28<sup>th</sup> Day of April, 2010

Robin Berg Tabakin, Chair  
Government Records Council

I attest the foregoing is a true and accurate record of the Government Records Council.

Janice L. Kovach, Secretary  
Government Records Council

**Decision Distribution Date: April 29, 2010**

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paragraph will begin with a new sentence number. If only a portion of a sentence is to be redacted, the word in the sentence which the redaction follows or precedes, as the case may be, will be identified and set off in quotation marks. If there is any question as to the location and/or extent of the redaction, the GRC should be contacted for clarification before the record is redacted. The GRC recommends the redactor make a paper copy of the original record and manually "black out" the information on the copy with a dark colored marker, then provide a copy of the blacked-out record to the requester.

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director  
April 28, 2010 Council Meeting**

**Nancy Lewen<sup>1</sup>  
Complainant**

**GRC Complaint No. 2008-211**

v.

**Robbinsville Public School District (Mercer)<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:** Copies of e-mails to or from Kathie Foster from December 1, 2006 through August 15, 2008 that contain the word “Lewen” in the body, subject, to, or copy (cc:) portions of the e-mails.

**Request Made:** August 15, 2008

**Response Made:** August 26, 2008

**Custodian:** Robert DeVita, School Business Administrator<sup>3</sup>

**GRC Complaint Filed:** September 18, 2008<sup>4</sup>

**Background**

**December 22, 2009**

At the December 22, 2009 public meeting, the Government Records Council (“Council”) considered the December 9, 2009 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. Because the Complainant’s request specifically identified the e-mails sought by recipient or sender, by date range and by content, and because Custodian John Szabo by using the given criteria was able to identify the records responsive to the Complainant’s request, said request is not overly broad or invalid and Custodian John Szabo has failed to bear his burden of proof that the denial of access to the requested records was authorized by law in accord with N.J.S.A. 47:1A-6. *See also* Courier Post v. Lenape Regional High

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

<sup>2</sup> Represented by Thomas Segreto, Esq., of Scarinci Hollenbeck, LLC (Lyndhurst, NJ).

<sup>3</sup> Superintendent of Schools Dr. John Szabo was the original Custodian and responded to the Complainant’s OPRA request on August 26, 2008 before he retired from the agency. Louise B. Davis succeeded Dr. Szabo as the Custodian and was the Custodian at the time the Statement of Information was filed. On or about December 22, 2009, Ms. Davis left the employ of the agency and was replaced by Mr. DeVita, the present Custodian.

<sup>4</sup> The GRC received the Denial of Access Complaint on said date.

School District, 360 N.J. Super. 191, 206 (Law Div. 2002) and Sandoval v. NJ State Parole Board, GRC Complaint No. 2006-167 (October 2008).

2. The Custodian shall disclose to the Complainant all attachments to the e-mails responsive to the request that have not already been disclosed, unless the Custodian cannot open or otherwise retrieve any such attachment, in which case the Custodian shall state with specificity the reason such attachment cannot be disclosed to the Complainant.
3. **The Custodian shall comply with item #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, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director.**
4. Pursuant to Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005), the GRC must conduct an *in camera* review of the record listed in Table 1, an e-mail from Kathie Foster to Helen Payne dated November 12, 2007, to determine the validity of the assertion by the Custodian that the record was not unreasonably redacted.
5. **The Custodian must deliver to the Council in a sealed envelope nine (9) copies of the requested unredacted documents (see #4 above), a document or redaction index, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4, that the documents provided are the documents requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**
6. The Council defers analysis of whether either or both Custodians 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.

#### **December 23, 2009**

Council's Interim Order distributed to the parties.

#### **December 28, 2009**

E-mail from the Custodian's Counsel to the GRC. Counsel requests a five (5) business day extension of time to respond to the Council's December 22, 2009 Interim Order.

#### **December 28, 2009**

E-mail from the GRC to the Custodian's Counsel. The GRC grants Counsel a five (5) business day extension of time to respond to the Council's Interim Order.

**January 8, 2010**

E-mail from the Custodian's Counsel to the GRC. Counsel informs the GRC that he recently learned that the Custodian is no longer employed by the Robbinsville School District ("BOE") and therefore requests an additional five (5) business day extension of time to respond to the Council's December 22, 2009 Interim Order.

**January 11, 2010**

E-mail from the GRC to the Custodian's Counsel. The GRC grants Counsel an additional five (5) business day extension of time to respond to the Council's Interim Order. The GRC informs Counsel that the Custodian's response is now due to the GRC by January 19, 2010.

**January 14, 2010**

Telephone call from the Custodian's Counsel to the GRC. Counsel informs the GRC that there are extenuating circumstances in this matter because the Custodian at the time the OPRA request was filed, Dr. John Szabo, and the Custodian at the time the complaint was filed, Louise Davis, are no longer in the employ of the BOE. Counsel states that a new Custodian, Robert DeVita, was recently appointed but that Mr. DeVita has no knowledge of the instant complaint and cannot certify to any facts concerning the matter. Counsel states that he is the only person who has knowledge of the facts in this complaint and can submit a certification with respect to any of the facts relevant to the interim order compliance; however, Counsel states that his certification may not be sufficient. Counsel states the GRC may be better served by reviewing Custodian Davis' certification with respect to the legal reasons for redacting the requested documents. The GRC informs the Custodian's Counsel to provide everything he and the newly appointed Custodian can provide in satisfaction of the terms of the Council's Order and that the GRC will review it and advise Counsel if anything further needs to be submitted to the GRC.

**January 15, 2010**

Letter from the Custodian's Counsel to the GRC. Counsel submits to the GRC nine (9) copies of the unredacted record requested for the *in camera* inspection, which is an e-mail from Kathie Foster to Helen Payne dated November 12, 2007. Counsel also states that the present Custodian has no personal knowledge of this matter and he requests the GRC consider the certified statements contained in the Statement of Information ("SOI") which previously set forth the Custodian's reasons for redacting the record; to wit, that certain information from advisory committees was redacted as inter-agency or intra-agency advisory, consultative, or deliberative ("ACD") material pursuant to N.J.S.A. 47:1A-1.1. and that information pertaining to students was redacted pursuant to N.J.A.C. 6:3-6.5. The Custodian cited Botta v. Borough of Ramsey Clerk, GRC Complaint No. 2003-94 (February 2004) and the New Jersey Department of State, Division of Archives and Records Management's ("DARM") Circular Letter 03-10-ST, *Managing Electronic Mail: Guidelines and Best Practices*, Section 1.5.1.1 as providing a legal basis for making some of the redactions. Rather than provide a word description of the redactions made to the record, Counsel includes a copy of the redacted record itself.



**January 18, 2010**

Letter from the Custodian's Counsel to the GRC. Counsel submits to the GRC a certification wherein he avers that past Custodians John Szabo and Louise Davis are no longer employed by the BOE and that Robert DeVita is the newly appointed Custodian but has no knowledge of the instant complaint. Counsel further avers that he has personal knowledge regarding the Complainant's request for the attachments to the e-mails responsive to the request. Counsel certifies that after the Complainant had identified the attachments that she wanted, Counsel addressed the issue with the Custodian, obtained copies of the attachments from the Custodian, and provided the attachments to the Complainant. The Custodian's Counsel certifies that said records were first provided to the Complainant on February 20, 2009 and included all attachments that were responsive to the Complainant's request except for a few logo graphics which the BOE was unable to print. Counsel attaches to his certification "Exhibit A" which contains e-mail communications regarding the attachments, as well as twenty-one (21) pages of attachments responsive to the request.<sup>5</sup>

**January 26, 2010**

E-mail from the GRC to the Custodian's Counsel. The GRC informs Counsel that the Custodian did not certify that the documents he provided to the GRC are the documents requested by the Council for the *in camera* inspection. The GRC asks Counsel to have the Custodian submit said certification.

**January 26, 2010**

E-mail from the Custodian's Counsel to the GRC. Counsel informs the GRC that the present Custodian does not have sufficient knowledge of the facts of this complaint in order to prepare such a certification but that Counsel will submit the certification on behalf of the BOE.

**January 27, 2010**

Certification of Counsel. The Custodian's Counsel submits a certification to the GRC wherein Counsel avers that the unredacted record he delivered to the GRC for *in camera* examination is the record as it was originally printed from the BOE computer and provided to Counsel.

**Analysis****Whether the Custodian complied with the Council's December 22, 2009 Interim Order?**

At its December 22, 2009 public meeting, the Council found that Custodian John Szabo failed to bear his burden of proof that the denial of access to the requested records was authorized by law, therefore the Council ordered the Custodian within five (5) business days from receipt of the Council's Interim Order to disclose to the Complainant all attachments to the e-mails responsive to the request that had not already been disclosed, unless said attachments could not be opened or otherwise retrieved, in which case the Custodian was required to state the reason such attachments could not be

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<sup>5</sup> The Custodian's Counsel also provided a copy of this correspondence to the Complainant.  
Nancy Lewen v. Robbinsville Public School District (Mercer), 2008-211 – Findings and Recommendations of the Executive Director

disclosed to the Complainant. The Council also ordered the Custodian to deliver to the Council within five (5) business days from receipt of the Interim Order, in a sealed envelope, nine (9) copies of an unredacted e-mail from Kathie Foster to Helen Payne dated November 12, 2007, a document or redaction index, as well as a legal certification from the Custodian that the documents provided are the documents requested by the Council for an *in camera* inspection to determine the validity of the assertion by the Custodian that the requested record was not unreasonably redacted.

The Custodian's Counsel e-mailed the GRC on December 28, 2009 to inform the GRC that he just received the Council's Interim Order. Counsel's request for a five (5) business day extension of time was granted by the GRC. Subsequently, by e-mail dated January 8, 2010, the Custodian's Counsel informed the GRC that he recently learned that Custodian Louise Davis was no longer employed by the BOE and therefore Counsel requested an additional five (5) business day extension of time to respond to the Interim Order. The GRC informed Counsel that the extension of time was granted and that the Custodian's response to the Interim Order would be due by January 19, 2010.

In a telephone conversation with the GRC on January 14, 2010, the Custodian's Counsel informed the GRC that Robert DeVita replaced Louise Davis as the BOE Custodian but that the newly appointed Custodian has no knowledge of the instant complaint and cannot certify to any facts concerning it. Counsel stated that he has knowledge of the facts of the instant complaint and will submit a certification on behalf of the Custodian. Thereafter, on January 15, 2010, the Custodian's Counsel provided the GRC with the unredacted records requested for the *in camera* inspection. Instead of a redaction index, Counsel provided the GRC with a copy of the redacted record itself. On January 18, 2010, Counsel provided the GRC with a certification of counsel wherein the Custodian's Counsel certified that after the Complainant had identified the attachments she wanted, Counsel obtained copies of the attachments from the Custodian and provided the attachments to the Complainant. Counsel certifies that said records were first provided to the Complainant on February 20, 2009, and included all attachments that were responsive to the Complainant's request except for a few logo graphics which Counsel certified the BOE was unable to print. The Custodian's Counsel failed to provide the GRC with a certification that the documents he provided to the GRC are the documents requested by the Council for the *in camera* inspection; however, when reminded to do so by the GRC he promptly provided a certification of counsel to that effect.

Therefore, because the Custodian's Counsel on behalf of the Custodian and within the time period provided by the terms of the Council's Interim Order as extended, (a) certified that all attachments to the e-mails responsive to the request were disclosed to the Complainant on February 20, 2009 except for a few logo graphics which the agency was unable to print, and (b) delivered to the Council in a sealed envelope nine (9) copies of the requested unredacted documents and nine (9) copies of those same records in redacted form to serve as a redaction index, as well as a legal certification that the documents provided are the documents requested by the Council for the *in camera*

inspection, the Custodian complied in a timely manner with the terms of the Council's December 22, 2009 Interim Order.<sup>6</sup>

**Whether the Custodian unlawfully denied the Complainant access to an e-mail from Kathie Foster to Helen Payne dated November 12, 2007 by improperly redacting portions of said record?**

The Complainant alleged that she was unlawfully denied access to an e-mail from Kathie Foster to Helen Payne dated November 12, 2007 at 8:13 a.m. because portions of it were improperly redacted by the Custodian.

The Complainant argued that she is entitled to view the record in its entirety. The Custodian certified that the redactions made to the record were made after consultation with legal counsel. Although the Custodian certified that she noted the legal basis for each redaction, the GRC was not provided with the specific legal reason for the redactions made to this particular record. The Custodian's Counsel stated that the e-mail was redacted to remove information that should not be disclosed to the public. Counsel further stated that because Custodian Davis is no longer employed by the BOE, the GRC should consider her certified statements contained in the SOI which set forth the legal reasons for redacting the records. In the SOI, the Custodian certified that the legal reasons for redacting the records are:

- Recommendations provided in DARM's Circular Letter 03-10-ST, *Managing Electronic Mail: Guidelines and Best Practices*, Section 1.5.1.1 precluded release of certain information
- Information pertaining to students was withheld from disclosure pursuant to *N.J.A.C. 6:3-6.5*
- Information was withheld from disclosure pursuant to the Council's holding in *Botta v. Borough of Ramsey Clerk*, GRC Complaint No. 2003-94 (February 2004)
- Certain information was alleged to be ACD material pursuant to *N.J.S.A. 47:1A-1.1*.

The GRC conducted an *in camera* examination on the submitted record vis-à-vis the Custodian's legal reasons set forth in the SOI for redacting the records. Each of the Custodian's reasons will be analyzed in turn.

DARM's Circular Letter 03-10-ST, *Managing Electronic Mail: Guidelines and Best Practices*, Section 1.5.1.1 refers to e-mails that are personal correspondence. This provision states that "[a]ny e-mail not received or created in the course of state business

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<sup>6</sup> Given the unforeseen circumstances of replacement custodians during the pendency of the adjudication, the GRC informed the Custodian's Counsel to provide everything he and the newly appointed Custodian could provide in satisfaction of the terms of the Council's Order and that the GRC would review it and advise Counsel if anything further needed to be submitted to the GRC. Although Counsel failed to submit this certification within the time set forth in the Interim Order, he promptly submitted it upon notice from the GRC. Therefore, in light of the GRC's representations, the certification is considered a timely submission.

may be deleted immediately, since it is not an official record.” It then goes on to cite examples such as SPAM or “let’s do lunch” messages. This section of the circular letter concerns retention requirements and allows for deletion of non-record messages. As such, it cannot provide a legal basis for redacting segments of a non-record e-mail because such an e-mail is, by operation of this provision, exempt from the State’s retention requirements.

The subject e-mail does not pertain to a student, therefore the proscriptions against disclosure of student information set forth in *N.J.A.C.* 6:3-6.5 are not applicable to this particular e-mail.

The Custodian cites Botta v. Borough of Ramsey Clerk, GRC Complaint No. 2003-94 (February 2004) for its inclusion of a GRC response to an inquiry from the custodian concerning retrieval of an e-mail from a remote storage location. The GRC responded, in relevant part (as emphasized by the Custodian) that “[a]n email sent or received on a government computer, the content of which is not used for government purposes, is not a government record and not disclosable.” This GRC opinion is pertinent to the issue of whether, based upon content, a given e-mail is a government record. Only government records are subject to the provisions of OPRA. Here, however, there is no question that the requested record is a government record. In the SOI, the Custodian certified that “[a]ll emails *responsive to the request* were provided with certain delineated redactions...” (Emphasis added.)<sup>7</sup> The Custodian subsequently attached a copy of the subject e-mail, in redacted form, to the SOI. Further, the Custodian’s Counsel in his response to the Complainant’s post-SOI submission wherein e-mail redactions were raised as an issue, stated in part that “...by redacting the document, the Board recognizes the fact that the document is a government record...”<sup>8</sup> Finally, the subject e-mail was sent by Kathie Foster to Helen Payne, thanking her for sending a copy of an e-mail generated by the Complainant. The e-mail contained the subject caption “RE: lewen” (sic). N.J.S.A. 47:1A-1.1., in relevant part, defines a government record as “... any [material including information stored or maintained electronically] that has been made, maintained or kept on file in the course of...official business...” Accordingly, the subject e-mail sent from the Robbinsville Public School District’s Assistant Superintendent to the Principal of the Avon School referencing “Lewen” has been made and kept on file in the course of official business and is therefore a government record responsive to the Complainant’s request.

The final legal reason set forth in the Custodian’s SOI for redacting the record was to remove certain information alleged to be ACD material pursuant to N.J.S.A. 47:1A-1.1.

OPRA excludes from the definition of a government record “inter-agency or intra-agency advisory, consultative or deliberative material.” N.J.S.A. 47:1A-1.1. It is evident that this phrase is intended to exclude from the definition of a government record the types of documents that are the subject of the “deliberative process privilege.”

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<sup>7</sup> SOI Item 9(c).

<sup>8</sup> See Counsel’s {00505764.DOC} page 4.

In O’Shea v. West Milford Board of Education, GRC Complaint No. 2004-93 (April 2006), the Council stated that “neither the statute nor the courts have defined the terms... ‘advisory, consultative, or deliberative’ in the context of the public records law. The Council looks to an analogous concept, the deliberative process privilege, for guidance in the implementation of OPRA’s ACD exemption. Both the ACD exemption and the deliberative process privilege enable a governmental entity to shield from disclosure material that is pre-decisional and deliberative in nature. Deliberative material contains opinions, recommendations, or advice about agency policies. In Re the Liquidation of Integrity Insurance Company, 165 N.J. 75, 88 (2000); In re Readoption With Amendments of Death Penalty Regulations, 182 N.J.149 (App. Div. 2004).

The deliberative process privilege is a doctrine that permits government agencies to withhold documents that reflect advisory opinions, recommendations and deliberations submitted as part of a process by which governmental decisions and policies are formulated. NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 150, 95 S. Ct. 1504, 1516, 44 L. Ed. 2d 29, 47 (1975). Specifically, the New Jersey Supreme Court has ruled that a record that contains or involves factual components is entitled to deliberative-process protection under the exemption in OPRA when it was used in decision-making process *and* its disclosure would reveal deliberations that occurred during that process. Education Law Center v. NJ Department of Education, 198 N.J. 274, 966 A.2d 1054, 1069 (2009). This long-recognized privilege is rooted in the concept that the sovereign has an interest in protecting the integrity of its deliberations. The earliest federal case adopting the privilege is Kaiser Alum. & Chem. Corp. v. United States, 157 F. Supp. 939 (1958). The privilege and its rationale were subsequently adopted by the federal district courts and circuit courts of appeal. United States v. Farley, 11 F.3d 1385, 1389 (7th Cir.1993).

The deliberative process privilege was discussed at length in In Re Liquidation of Integrity Insurance Co., 165 N.J. 75 (2000). There, the court addressed the question of whether the Commissioner of Insurance, acting in the capacity of Liquidator of a regulated entity, could protect certain records from disclosure which she claimed contained opinions, recommendations or advice regarding agency policy. *Id.* at 81. The court adopted a qualified deliberative process privilege based upon the holding of McClain v. College Hospital, 99 N.J. 346 (1985), Liquidation of Integrity, *supra*, 165 N.J. at 88. In doing so, the court noted that:

“[a] document must meet two requirements for the deliberative process privilege to apply. First, it must have been generated before the adoption of an agency's policy or decision. In other words, it must be pre-decisional. ... Second, the document must be deliberative in nature, containing opinions, recommendations, or advice about agency policies. ... Purely factual material that does not reflect deliberative processes is not protected. ... Once the government demonstrates that the subject materials meet those threshold requirements, the privilege comes into play. In such circumstances, the government's interest in candor is the "preponderating policy" and, prior to considering specific questions of application, the balance is said to have been struck in favor of non-disclosure.” (Citations omitted.) *Id.* at 84-85.

The court further set out procedural guidelines based upon those discussed in McClain:

“[t]he initial burden falls on the state agency to show that the documents it seeks to shield are pre-decisional and deliberative in nature (containing opinions, recommendations, or advice about agency policies). Once the deliberative nature of the documents is established, there is a presumption against disclosure. The burden then falls on the party seeking discovery to show that his or her compelling or substantial need for the materials overrides the government's interest in non-disclosure. Among the considerations are the importance of the evidence to the movant, its availability from other sources, and the effect of disclosure on frank and independent discussion of contemplated government policies.” In Re Liquidation of Integrity, *supra*, 165 N.J. at 88, *citing McClain*, *supra*, 99 N.J. at 361-62.

As the court in Integrity, *supra*, pointed out, in order for the deliberative process privilege to apply both prongs of a two-prong test must be satisfied. First, the record must have been generated before the adoption of the agency's policy or decision, and second the record must be deliberative in nature, containing opinions, recommendations, or advice about agency policies. Here, because the Custodian certified that portions of the record contained redacted ACD material, it is implicit in said certification that the record was generated before the adoption of the Board's related policy or decision and there is nothing in the record to indicate otherwise. To satisfy the second prong of the test the court stated that the document must be deliberative in nature, containing opinions, recommendations, or advice about agency policies. The *in camera* examination of the submitted record revealed that in the first paragraph following the salutation, the second sentence (which trails off) does express an opinion. That opinion, however, does not touch upon the deliberative process; therefore it does not constitute ACD material.

On this point, the Supreme Court's lengthy examination of the deliberative process privilege in Education Law Center, *supra*, is instructive. In this matter, the Appellate Division affirmed the trial court's finding that a document which contains factual material is not deliberative, and therefore does not qualify for OPRA's ACD exemption. The Supreme Court, in reversing the judgment of the Appellate Division, determined that a document can include factual components and still be protected from disclosure pursuant to the ACD exemption in OPRA if the document was used in the agency's efforts to reason through to an ultimate decision and disclosure thereof would reveal the nature of the deliberations. In reaching its decision, the court made several observations about the deliberative *process*:

“...the question of what is protected under the deliberative process privilege, incorporated into OPRA as an exemption from the definition of a ‘government document,’ must depend, first, on whether the information sought is a part of the process leading to formulation of an agency's decision, (not on a simplistic label of ‘fact’ or ‘opinion,’), and, second, on the material's ability to reflect or to expose the deliberative aspects of that process...” *Id.* at 295. “...in Integrity, *supra*,...[w]hen we said that

‘[p]urely factual material that does not reflect deliberative processes is not protected’...that comment was not meant to establish a rigid dichotomy such that all material that could be classified as ‘opinion’ is confidential whereas all material that could be classified as ‘factual’ must be disclosed...the deliberative nature of the material sought must be functionally determined based on the document's nexus to the decision-making process and its capacity to expose the agency's deliberations during that process.” *Id.* at 297.

In the instant matter, the *in camera* examination of the submitted record revealed that there is no nexus between the content of the record and the decision-making process, much less its capacity to expose any deliberations. As such, the record is not comprised of ACD material subject to redaction pursuant to N.J.S.A. 47:1A-1.1.

Accordingly, because the *in camera* examination of an e-mail from Kathie Foster to Helen Payne dated November 12, 2007 at 8:13 a.m. revealed the Custodian unlawfully denied the Complainant access to said record pursuant to N.J.S.A. 47:1A-6., the Custodian must disclose the unredacted record to the Complainant within five (5) business days of the Council’s Interim Order.

**Whether the Custodian’s delay in access to the requested records rises to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances?**

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.

**Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. Because the Custodian’s Counsel on behalf of the Custodian and within the time period provided by the terms of the Council’s Interim Order as extended, (a) certified that all attachments to the e-mails responsive to the request were disclosed to the Complainant on February 20, 2009 except for a few logo graphics which the agency was unable to print, and (b) delivered to the Council in a sealed envelope nine (9) copies of the requested unredacted documents and nine (9) copies of those same records in redacted form to serve as a redaction index, as well as a legal certification that the documents provided are the documents requested by the Council for the *in camera* inspection, the Custodian complied in a timely manner with the terms of the Council’s December 22, 2009 Interim Order.
2. Because the *in camera* examination of an e-mail from Kathie Foster to Helen Payne dated November 12, 2007 at 8:13 a.m. revealed the Custodian unlawfully denied the Complainant access to said record pursuant to N.J.S.A.

47:1A-6., the Custodian must disclose the unredacted record to the Complainant within five (5) business days of the Council's Interim Order.<sup>9</sup>

3. **On the basis of the Council's determination in this matter, the Custodian shall comply with the Council's Findings of the *In Camera* Examination set forth in paragraph 2 above within five (5) business days from receipt of this Order and simultaneously provide certified confirmation of compliance pursuant to N.J. Court Rules, 1969 R. 1:4-4 (2005) to the Executive Director.**
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.

Prepared By: John E. Stewart  
Case Manager/*In Camera* Attorney

Approved By: Catherine Starghill, Esq.  
Executive Director

April 1, 2010

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<sup>9</sup> **Unless expressly identified for redaction, everything in the record shall be disclosed.** For purposes of identifying redactions, unless otherwise noted a paragraph/new paragraph begins whenever there is an indentation and/or a skipped space(s). The paragraphs are to be counted starting with the first whole paragraph in each record and continuing sequentially through the end of the record. If a record is subdivided with topic headings, renumbering of paragraphs will commence under each new topic heading. Sentences are to be counted in sequential order throughout each paragraph in each record. Each new paragraph will begin with a new sentence number. If only a portion of a sentence is to be redacted, the word in the sentence which the redaction follows or precedes, as the case may be, will be identified and set off in quotation marks. If there is any question as to the location and/or extent of the redaction, the GRC should be contacted for clarification before the record is redacted. The GRC recommends the redactor make a paper copy of the original record and manually "black out" the information on the copy with a dark colored marker, then provide a copy of the blacked-out record to the requester.





State of New Jersey  
GOVERNMENT RECORDS COUNCIL  
101 SOUTH BROAD STREET  
PO BOX 819  
TRENTON, NJ 08625-0819

JON S. CORZINE  
Governor

CHARLES A. RICHMAN  
Acting Commissioner

**INTERIM ORDER**

**December 22, 2009 Government Records Council Meeting**

Nancy Lewen  
Complainant

Complaint No. 2008-211

v.

Robbinsville Public School District (Mercer)  
Custodian of Record

At the December 22, 2009 public meeting, the Government Records Council (“Council”) considered the December 9, 2009 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. Because the Complainant’s request specifically identified the e-mails sought by recipient or sender, by date range and by content, and because Custodian John Szabo by using the given criteria was able to identify the records responsive to the Complainant’s request, said request is not overly broad or invalid and Custodian John Szabo has failed to bear his burden of proof that the denial of access to the requested records was authorized by law in accord with N.J.S.A. 47:1A-6. *See also* Courier Post v. Lenape Regional High School District, 360 N.J.Super. 191, 206 (Law Div. 2002) and Sandoval v. NJ State Parole Board, GRC Complaint No. 2006-167 (October 2008).
2. The Custodian shall disclose to the Complainant all attachments to the e-mails responsive to the request that have not already been disclosed, unless the Custodian cannot open or otherwise retrieve any such attachment, in which case the Custodian shall state with specificity the reason such attachment cannot be disclosed to the Complainant.
3. **The Custodian shall comply with item #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, and simultaneously provide certified**



**confirmation of compliance, in accordance with N.J. Court Rule 1:4-4<sup>1</sup>, to the Executive Director.**

4. Pursuant to Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005), the GRC must conduct an *in camera* review of the record listed in Table 1, an e-mail from Kathie Foster to Helen Payne dated November 12, 2007, to determine the validity of the assertion by the Custodian that the record was not unreasonably redacted.
5. **The Custodian must deliver<sup>2</sup> to the Council in a sealed envelope nine (9) copies of the requested unredacted documents (see #4 above), a document or redaction index<sup>3</sup>, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,<sup>4</sup> that the documents provided are the documents requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**
6. The Council defers analysis of whether either or both Custodians 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.

Interim Order Rendered by the  
Government Records Council  
On The 22<sup>nd</sup> Day of December, 2009

Robin Berg Tabakin, Chair  
Government Records Council

I attest the foregoing is a true and accurate record of the Government Records Council.

Harlynn A. Lack, Secretary  
Government Records Council

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<sup>1</sup> "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."

<sup>2</sup> The *in camera* documents may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as they arrive at the GRC office by the deadline.

<sup>3</sup> The document or redaction index should identify the document and/or each redaction asserted and the lawful basis for the denial.

<sup>4</sup> "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."

**Decision Distribution Date: December 23, 2009**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
December 22, 2009 Council Meeting**

**Nancy Lewen<sup>1</sup>  
Complainant**

**GRC Complaint No. 2008-211**

v.

**Robbinsville Public School District (Mercer)<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:** Copies of e-mails to or from Kathie Foster from December 1, 2006 through August 15, 2008 that contain the word “Lewen” in the body, subject, to, or copy (cc:) portions of the e-mails.

**Request Made:** August 15, 2008

**Response Made:** August 26, 2008

**Custodian:** Louise B. Davis, School Business Administrator<sup>3</sup>

**GRC Complaint Filed:** September 18, 2008<sup>4</sup>

**Background**

**August 15, 2008**

Complainant’s Open Public Records Act (“OPRA”) request. The Complainant requests the records relevant to this complaint listed above on an official OPRA request form.<sup>5</sup>

**August 26, 2008**

Custodian’s response to the OPRA request. The Custodian responds in writing to the Complainant’s OPRA request on the seventh (7<sup>th</sup>) business day following receipt of such request, wherein the Custodian denies the Complainant access to the requested records because the Custodian contends that the Complainant’s request is overly broad and an improper demand for research and also because the Custodian asserts that the

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

<sup>2</sup> Represented by Thomas Segreto, Esq., of Scarinci Hollenbeck, LLC (Lyndhurst, NJ).

<sup>3</sup> Superintendent of Schools John Szabo was the original Custodian and responded to the Complainant’s OPRA request on August 26, 2008.

<sup>4</sup> The GRC received the Denial of Access Complaint on said date.

<sup>5</sup> Neither the Complainant nor the Custodian provided the GRC with a copy of the Complainant’s OPRA request form. The Complainant states that a copy of the request form is not available and the Custodian submits a copy of the Complainant’s July 25, 2008 OPRA request, which is not relevant to the instant complaint. The Custodian, however, in the response to the Complainant’s request, acknowledges that an OPRA request was received from the Complainant on August 15, 2008 and the Custodian provides a transcription of said request to the GRC.

implication of the Complainant's request seeks information about students, the disclosure of which is prohibited by state and federal laws.

The Custodian also informs the Complainant in the same response that fulfilling the request will substantially disrupt the operations of the agency; therefore the Custodian asks for an extension of time until September 5, 2008 to comply with the Complainant's request. The Custodian further informs the Complainant that she will have to pay a special service charge, the estimate for which the Custodian will provide to the Complainant on September 5, 2008. The Custodian requests that the Complainant clarify her request and informs her that by doing so she will minimize the special service fee charges.

The Custodian further informs the Complainant that a search of the e-mails using the keyword "Lewen" will yield hundreds of e-mails concerning the student surnamed Lewen and will necessarily implicate information pertaining to other students. The Custodian suggests that the Complainant modify her request to provide an additional search term which falls within the scope of the information sought by the Complainant. In support of his position for a clarification of the request, the Custodian cites Cody v. Middletown Township Public Schools, GRC Complaint No. 2005-98 (December 2006). The Custodian also states that in responding to such a voluminous request, it is likely that much information may have to be redacted because *N.J.A.C. 6:3-6.5 (c)(14)* limits the right of access to student information. The Custodian further informs the Complainant that if she clarifies her request by adding an additional search term she will minimize costs incurred by the special service charge.

### **September 18, 2008**

Denial of Access Complaint filed with the Government Records Council ("GRC") attaching the Custodian's response to the OPRA request dated August 26, 2008.

The Complainant verifies that she provided her OPRA request to the Custodian on August 15, 2008 and the Custodian responded to her request on August 26, 2008. The Complainant states that her request is a revision and narrowing of an earlier request dated July 25, 2008. The Complainant further states that the custodian who addressed her previous request informed her that a search for the keyword "Lewen" yielded one hundred ten (110) items, but as the Complainant's request was framed at that time thirteen hundred (1300) items were found to be responsive to it. The Complainant states that in the instant matter she narrowed the scope of her request from four (4) keywords to one (1) keyword; however, the Complainant states that the present Custodian contends the request is still too broad.

The Complainant states that she disputes the Custodian's denial of access for several reasons. The Complainant argues that her daughter is the only student with the surname Lewen; therefore, no other student information should be on the requested e-mails and redaction will not be necessary. The Complainant further argues that Kathie Foster, the Assistant Superintendent, did not have extensive e-mail correspondence with her daughter and for this reason few e-mails to or from Ms. Foster would require redaction. The Complainant also contends that the Custodian's estimate that there would be a voluminous number of e-mails to collect, assemble and evaluate is wrong because

the Complainant states that she was informed by the custodian who responded to her July 25, 2008 OPRA request that a search for the keyword “Lewen” yielded only one hundred ten (110) e-mails. The Complainant states that she will not clarify her request by adding an additional search term because she believes doing so would eliminate some of the documents that may be responsive to her request.

The Complainant agrees to mediate this complaint.

**September 30, 2008**

Offer of Mediation sent to the Custodian.

**October 2, 2008**

The Custodian agrees to mediation.

**October 8, 2008**

The complaint is referred for mediation.

**May 19, 2009**

The complaint is referred back from mediation to the GRC for adjudication.

**June 5, 2009**

Letter from the GRC to the Complainant. The GRC informs the Complainant that the matter has been referred back from mediation to the GRC for adjudication and offers the Complainant an opportunity to amend her complaint in the event some issues were resolved during mediation.

**June 21, 2009**

E-mail from the Complainant to the GRC. The Complainant states that she does not want to amend her complaint but requests that the GRC accept from her a summary of events to date.

**June 22, 2009**

E-mail from the GRC to the Complainant. The GRC informs the Complainant that she should not send a summary of events because there is no provision for other than one (1) submission to the GRC per party.<sup>6</sup> The GRC also informs the Complainant that the matter has been in mediation and a summary of that process is not appropriate.<sup>7</sup>

**July 28, 2009**

Request for the Statement of Information (“SOI”) sent to the Custodian.

**August 4, 2008**

E-mail from the GRC to the Custodian. The GRC grants the Custodian’s request for a five (5) business day extension of time to prepare and submit the SOI to the GRC.<sup>8</sup>

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<sup>6</sup> Pursuant to GRC regulations. See *N.J.A.C. 5:105-2.3*.

<sup>7</sup> GRC regulations provide that the mediation proceedings are confidential. See *N.J.A.C. 5:105-2.5*.

<sup>8</sup> Custodian’s Counsel informs the GRC that there has been a change in the Custodian from John Szabo to Louise Davis.

**August 10, 2009**

Custodian's SOI with the following attachments:

- Complainant's OPRA request dated July 25, 2008<sup>9</sup>
- Letter from the Custodian to the Complainant dated August 26, 2008

The Custodian certifies that her search for the requested records involved using a search feature on the computer mail server program to retrieve e-mails with the requested keyword. Thereafter, the Custodian certifies she reviewed the records and redacted them in accordance with the law and the Division of Archives and Records Management Circular 03-01-ST, *Managing Electronic Mail: Guidelines and Best Practices*.<sup>10</sup> The Custodian also certifies that there are no retention schedules for electronic communications, but to the extent the e-mails constitute correspondence, the record series is 0004-0001 for general correspondence with a retention period of three (3) years and 0004-0002 for internal correspondence with a retention period of one (1) year. The Custodian further certifies that no records were destroyed in accordance with the Records Destruction Schedule established and approved by New Jersey Department of State, Division of Archives and Records Management ("DARM") retention schedule M7000101-999.

The Custodian certifies that on January 20, 2009 all records responsive to the Complainant's request were disclosed to the Complainant. The Custodian also certifies that certain personal information was redacted, including names and telephone numbers of all individuals discussed in e-mails as they related to placement on boards and/or advisory committees, as advisory, deliberative and consultative ("ACD") material pursuant to N.J.S.A. 47:1A-1.1. The Custodian further certifies that information pertaining to students was redacted pursuant to *N.J.A.C.* 6:3-6.5. The Custodian cites to Botta v. Borough of Ramsey Clerk, GRC Complaint No. 2003-94 (February 2004) and DARM's Circular Letter 03-10-ST, *Managing Electronic Mail: Guidelines and Best Practices*, Section 1.5.1.1 as providing a legal basis for making some of the redactions.

The Custodian's Counsel argues that, notwithstanding the Custodian's initial denial of access to the requested records, because the request was overly broad the Custodian subsequently disclosed all records responsive to the Complainant's request with minimal redactions. Counsel states that the reason for each of the redactions was explained to the Complainant. Counsel asserts that all of the redacted material was properly deleted from the records and, moreover, the Custodian was duty bound to redact such material. Counsel contends that it was reasonable for the Custodian to request that the Complainant clarify her request by adding an additional search term in order to avoid superfluous and transient records. Counsel states that once the Complainant refused to modify her request the Custodian immediately conducted the search and redacted the records which resulted from the search.

The Custodian's Counsel argues that the redactions made to the e-mails were appropriate because some of the e-mails contained personal information, some contained

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<sup>9</sup> This is not the OPRA request that formed the basis of the complaint.

<sup>10</sup> The Custodian means Circular Letter 03-10-ST.

student information and some contained information that was exempt from disclosure as ACD material.

Counsel first turns to the legal reason for the Custodian redacting personal information from the requested records. Counsel contends that because OPRA defines a government record as certain material that has been “made, maintained or kept on file in the course of his or its official business,” if the information does not pertain to official business it is not a government record. Counsel cites *Botta, supra*, wherein the custodian requested an advisory opinion from the GRC to determine if an e-mail was subject to disclosure. The GRC’s opinion, *inter alia*, states “[a]n e-mail sent or received on a government computer, the content of which is not used for government purposes, is not a government record and not disclosable...” Counsel also cites to DARM’s Circular Letter 03-10-ST, *Managing Electronic Mail: Guidelines and Best Practices*, Section 1.5.1.1, which provides in relevant part, “[a]ny e-mail not received or created in the course of state business, may be deleted immediately, since it is not an official record...” Counsel contends that both the GRC and DARM are consistent in their position that personal information in an e-mail does not constitute a government record; therefore the Custodian properly redacted the personal messages from the requested e-mails.

The Custodian’s Counsel next argues that the Custodian has a responsibility under state and federal law to prohibit access to student information contained in government records pursuant to regulations contained in *N.J.A.C.* 6:3-6.5(c)(14) promulgated pursuant to N.J.S.A. 18A:36-19 and 20 U.S.C. § 1232g(b)(2)(A)-(B), respectively. Counsel contends that the Custodian properly redacted the records to prohibit access to such student information.

Finally, Counsel states that the Custodian properly redacted deliberative and consultative information because such information is exempt from disclosure as ACD material pursuant to N.J.S.A. 47:1A-1.1.

Counsel argues that the Complainant’s assumption that only information about her child would result from a search of the keyword “Lewen” is erroneous. Counsel states that such a search would yield information about other students who may be involved with the same issues as the Complainant’s child. Counsel also states that the Complainant’s assumption is incorrect that (because her daughter did not have extensive e-mail correspondence with Assistant Superintendent Foster) there should be only a few e-mails to or from Assistant Superintendent Foster that would require redaction. Counsel asserts that, due to the broadness of the Complainant’s request, e-mail strings would eventually be brought to the attention of the Assistant Superintendent. Counsel also states that, contrary to the Complainant’s assertion that the search she requested would only yield one hundred ten (110) e-mails, the search yielded hundreds of pages which had to be assembled and evaluated for redactions. Therefore, Counsel asserts that the Custodian needed additional time to fulfill the Complainant’s request. Counsel contends that the Custodian provided the requested records in redacted form and the Complainant did not raise any issues with respect to the redactions in her Denial of Access Complaint.



**August 10, 2009**

E-mail from the Complainant to the GRC. The Complainant states that she is in receipt of the Custodian's SOI. The Complainant asserts that the Custodian is incorrect by stating in the SOI that all records have been provided to her. The Complainant states she wants to respond to the Custodian's SOI.

**August 11, 2009**

E-mail from the GRC to the Complainant. The GRC informs the Complainant that the GRC ordinarily accepts two (2) submissions from the parties: the complaint and the SOI. The GRC further informs the Complainant that the GRC will accept a brief submission from the Complainant in response to the SOI only because the Complainant is alleging that there is incorrect information in the SOI.

**August 17, 2009**

The Complainant's response to the Custodian's SOI. The Complainant attaches forty-two (42) pages of records that she states the Custodian disclosed to her. The Complainant contends that the Custodian's SOI inaccurately asserts that all records responsive to the Complainant's request were provided to her. The Complainant states that several of the disclosed e-mails indicate that an attachment accompanied the e-mail; however, the Complainant contends that none of the attachments were disclosed to her. The Complainant asserts that an attachment is part of an e-mail and that she is entitled to all e-mail attachments for the e-mails that were determined to be responsive to her request. The Complainant also alleges that one (1) e-mail is improperly redacted. The Complainant states that the e-mail is marked as archived, it is a government record and she is entitled to view it in its entirety.

**August 18, 2009**

Custodian's certification. The Custodian certifies that the Complainant never requested the e-mail attachments when she filed her OPRA request that formed the basis of this complaint. The Custodian further certifies that, because she cannot search for a keyword within an attachment to an e-mail, each e-mail attachment would need to be opened with the corresponding program and the document would need to be separately searched. The Custodian avers that such a process would require extraordinary effort and constitute a research assignment. The Custodian cites to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J.Super. 534 (App. Div. 2005) as providing that OPRA does not countenance open ended searches of an agency's files. The Custodian certifies that on January 20, 2009, the agency provided the Complainant with all attachments to the requested e-mails that it had in its possession and were accessible on an informal basis. The Custodian also certified that the Custodian's Counsel provided the legal basis for all redactions made to the requested records.

**August 20, 2009**

Letter from the Custodian's Counsel to the GRC. The Custodian's Counsel contends that the Complainant was provided with a legal basis for each redaction, so there should not be an issue with regard to the appropriateness of any redaction made to the requested records disclosed to the Complainant. Counsel also argues that the Complainant's OPRA request was only for e-mails and not the attachments thereto. Counsel asserts that the Complainant's present argument that the search for terms within

an e-mail includes the attachments which are accessible with separate computer programs implicates MAG, *supra*, because searching through the e-mails and opening the attachments would require an extraordinary effort and constitute a research assignment within the meaning of OPRA. Counsel argues that such a request is overly broad and vague. Counsel argues that it would be unfair for the GRC to require the Custodian to extrapolate the scope of documents on an OPRA request to include records not specifically requested. Counsel suggests that the proper protocol is for a requestor to engage in a two-step process: first request the e-mails, and subsequently request the attachments that are identified thereon. Counsel cites New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007) and Gannett New Jersey Partners L.P. v. County of Middlesex, 379 N.J. Super. 205, 213 (App. Div. 2005), in support of this suggested protocol.

The Custodian's Counsel asserts that the Complainant's argument for disclosure of the e-mail attachments is moot because the Custodian already disclosed all attachments that were accessible and certain other header type attachments could not be accessed by the Custodian, therefore they could not be disclosed to the Complainant.

#### **August 30, 2009**

E-mail from the Complainant to the GRC. The Complainant sends a response to the Custodian's reply to the Complainant's response to the Custodian's SOI.

#### **August 30, 2009<sup>11</sup>**

E-mail from the GRC to the Complainant. The GRC reminds the Complainant that in the GRC's e-mail to the Complainant dated August 11, 2009, the GRC advised her that the GRC ordinarily accepts from the parties only the complaint and the SOI but that the GRC would make an exception and accept a brief submission from her because she alleged error in the SOI. The GRC states that it subsequently allowed the Complainant to send a forty-four (44) page submission, but will accept no further submissions from the parties.

### **Analysis**

#### **Whether the Custodian unlawfully denied access to the requested records?**

OPRA provides that:

“...government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, *with certain exceptions...*” (Emphasis added.) N.J.S.A. 47:1A-1.

Additionally, OPRA defines a government record as:

“... any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document,

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<sup>11</sup> Additional correspondence was submitted by the parties. However, said correspondence is either not relevant to this complaint or restates the facts/assertions already presented to the GRC.  
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information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof, that has been *made, maintained or kept on file* ... or *that has been received* in the course of his or its official business ...” (Emphasis added.) N.J.S.A. 47:1A-1.1.

OPRA also provides that:

“[u]nless a shorter time period is otherwise provided by statute, regulation, or executive order, *a custodian of a government record shall grant access ... or deny a request for access* ... as soon as possible, but not later than seven business days after receiving the request...The requestor shall be advised by the custodian when the record can be made available. If the record is not made available by that time, access shall be deemed denied...” (Emphasis added.) N.J.S.A. 47:1A-5.i.

OPRA places the onus on the Custodian to prove that a denial of access is lawful. Specifically, OPRA states:

“...[t]he public agency shall have the burden of proving that the denial of access is authorized by law...” N.J.S.A. 47:1A-6.

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.

There is no dispute between the parties that the Complainant provided her OPRA request to the Custodian on August 15, 2008 and the Custodian responded to her request on August 26, 2008, which was the seventh (7<sup>th</sup>) business day following receipt of the request. The Complainant contends that she was denied access to the records relevant to the complaint because the Custodian informed her that her OPRA request was not a valid request.

Although Custodian John Szabo replied to the Complainant within the time provided under OPRA, the content of the reply was so all-encompassing that it failed to be responsive to the Complainant’s request. First, the Custodian denied the Complainant’s request. Thereafter, the Custodian asked the Complainant to clarify her request, stated he would need an extension of time to comply with the request and informed the Complainant that she would incur a special service charge, all of which implying that he was not denying the Complainant’s request.

Pursuant to N.J.S.A. 47:1A-5.i., OPRA provides that a custodian must either grant or deny access to requested records within seven (7) business days from receipt of said request. The GRC further recognizes that a custodian may need to obtain clarification of the request from the complainant or may need an extension of time to comply with the request. See Leibel v. Manalapan Englishtown Regional Board of Education, GRC Complaint No. 2004-51 (September 2004) and Kelley v. Township of Rockaway, GRC

Complaint No. 2007-11 (October 2007). Therefore, a custodian may properly respond to a complainant's request by either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days. Here, the Custodian informed the Complainant he was taking all four (4) actions, which is impossible because several such actions are mutually exclusive. Accordingly, the GRC can only interpret the Custodian's response as a denial of the Complainant's request.

The Custodian asserted that there were two reasons for denying the Complainant access to the requested records: (1) that certain laws limit the right of access to student information, and (2) that the request was overly broad. With respect to the former reason for denying access, this is a lawful basis for denial only to the extent that such student information cannot be redacted. The Custodian, however, stated that it is likely much information would have to be redacted because the records would contain confidential student information; therefore, retaining the confidentiality of student records is possible through redaction and is not a lawful reason for denying the Complainant access to the requested records. The Custodian also informed the Complainant that her request was denied because it was overly broad. An overly broad request, if proven, is a lawful basis for denial of access.

OPRA requests that fail to identify specific government records have been deemed as invalid requests under OPRA. Specifically, the New Jersey Superior Court has held that "[w]hile 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." (Emphasis added.) MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J.Super. 534, 546 (App. Div. 2005). 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." (Emphasis added.) *Id.* at 549.

Further, in Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 2005),<sup>12</sup> the Superior Court references MAG in that the Court held that a requestor must specifically describe the document sought because OPRA operates to make identifiable government records "accessible." "As such, a proper request under OPRA must identify with reasonable clarity those documents that are desired, and a party cannot satisfy this requirement by simply requesting all of an agency's documents."<sup>13</sup>

Additionally, in New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007) the court cited MAG by stating that "...when a request is 'complex' because it fails to specifically identify the documents sought, then that request is not 'encompassed' by OPRA..." The court also quoted N.J.S.A. 47:1A-5.g in that "[i]f a request for access to a government record

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<sup>12</sup> Affirmed on appeal regarding Bent v. Stafford Police Department, GRC Case No. 2004-78 (October 2004).

<sup>13</sup> As stated in Bent, *supra*.

would substantially disrupt agency operations, the custodian may deny access to the record after attempting to reach a reasonable solution with the requestor that accommodates the interests of the requestor and the agency.” The court further stated that “...the Legislature would not expect or want courts to require more persuasive proof of the substantiality of a disruption to agency operations than the agency’s need to...generate new records...”

Furthermore, in Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009) the Council held that “[b]ecause the Complainant’s OPRA requests # 2-5 are not requests for identifiable government records, the requests are invalid and the Custodian has not unlawfully denied access to the requested records pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J.Super. 534 (App. Div. 2005) and Bent v. Stafford Police Department, 381 N.J.Super. 30 (App. Div. 2005).”

In the instant complaint, the Complainant’s request was not overly broad because unlike MAG, *supra*, and its progeny, the Complainant identified with reasonable clarity those documents that were desired. The GRC established the criteria deemed necessary to specifically identify an e-mail communication in Sandoval v. NJ State Parole Board, GRC Complaint No. 2006-167 (October 2008). In Sandoval, the Complainant requested “e-mail or written communications between Brown and Weinbaum from April 1, 2005 through June 23, 2006 [using seventeen (17) different keywords].” The Custodian denied the request, claiming that it was overly broad. The Council determined:

“The Complainant in the complaint now before the GRC requested specific e-mails by recipient, by date range and by content. Based on that information, the Custodian has identified 146 e-mails which fit the specific recipient and date range criteria Complainant requested. The Complainant’s request is not overly broad or invalid merely because the Custodian must review these particular e-mails for content or, more specifically, for privileged material. See, Courier Post v. Lenape Regional High School District, 360 N.J.Super. 191, 206 (Law Div. 2002)(“Redaction of privileged or confidential data cannot cause the release of otherwise public information to be placed in a straight jacket.”)” *Id.*

In the instant complaint, the Complainant also requested specific e-mails by recipient (or sender), by date range and by content. Here, as in Sandoval, *supra*, the Complainant’s request is not overly broad or invalid because the Custodian must review the records responsive to the request for content.

Accordingly, because the Complainant’s request specifically identified the e-mails sought by recipient or sender, by date range and by content, and because Custodian John Szabo by using the given criteria was able to identify the records responsive to the Complainant’s request, said request is not overly broad or invalid and Custodian John Szabo has failed to bear his burden of proof that the denial of access to the requested records was authorized by law in accord with N.J.S.A. 47:1A-6. See also Courier Post v.

Lenape Regional High School District, 360 N.J.Super. 191, 206 (Law Div. 2002) and Sandoval v. NJ State Parole Board, GRC Complaint No. 2006-167 (October 2008).

The Custodian certifies that once the Complainant stated that she wanted the records resulting from the original search, the Custodian immediately conducted a review of the records, made appropriate and legally cognizable redactions, and disclosed all of the requested records.<sup>14</sup>

The Complainant does not dispute the fact that all e-mails were disclosed to her, but she contends that the Custodian inaccurately asserts that all records responsive to the Complainant's request were provided to her. More specifically, the Complainant states that several of the disclosed e-mails indicate that an attachment accompanied the e-mail; however, the Complainant contends that none of the attachments were disclosed to her. The Complainant argues that she is entitled to the attachments because they constitute part of the e-mail. The Complainant also takes issue with redactions to one (1) of the e-mails. The Complainant identifies the e-mail as the record appearing on page twenty-two (22) of the attachment to her response to the Custodian's SOI dated August 17, 2009. This e-mail is more specifically described in the following table:

**TABLE 1**

<b>FROM</b>	<b>TO</b>	<b>REFERENCE</b>	<b>SENT</b>
Kathie Foster	Helen Payne	Lewen	November 12, 2007 8:13 a.m.

The Custodian certified that the Complainant never requested the e-mail attachments when she filed her OPRA request that formed the basis of this complaint. The Custodian further certified that the Complainant's argument that a request for e-mails includes the attachments to those e-mails implicates MAG, *supra*, because searching through the e-mails and opening the attachments would require an extraordinary effort and constitute a research assignment within the meaning of OPRA. The Custodian certifies that the Complainant should seek an attachment to an e-mail by filing a separate OPRA request.

The GRC disagrees with the Custodian's assertion. There is a fundamental nexus between a document and the attachment(s) to that document. Once a document incorporates another document by reference, the incorporated document becomes one with it; the attachment cannot then be severed without destroying the integrity of the whole. Often an e-mail serves only as a carrier of the message which is appended as an attachment. To require the requestor to request an e-mail attachment in addition to the e-mail itself or to file separate requests for the e-mail and its attachment strains the purpose of OPRA, which is to make government records readily accessible.<sup>15</sup>

DARM Circular Letter 03-10-ST, *Managing Electronic Mail: Guidelines and Best Practices*, defines an e-mail message as follows:

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<sup>14</sup> The Custodian certified that access to all e-mails containing the keyword "Lewen" was provided to the Complainant on January 20, 2009.

<sup>15</sup> See N.J.S.A. 47:1A-1.

“E-mail messages are electronic documents created and sent or received by a computer system. ***This definition applies equally to the contents of the communication, the transactional information, and any attachments associated with such communication.*** Thus, e-mail messages are similar to other forms of communicated messages, such as correspondence, memoranda, and circular letters.” (Emphasis added.) §1.3.2.

Because OPRA does not define an e-mail message, the GRC looks to the definition articulated by DARM. Accordingly, each e-mail found to be responsive to the Complainant’s request shall include the contents of the e-mail, the transactional information and any attachment(s) thereto.

Notwithstanding the Custodian’s assertion that the e-mail attachments were not part of the Complainant’s request, the Custodian’s Counsel stated that the Custodian disclosed all attachments to the e-mails to the extent that they were accessible. Counsel further stated that there were header type attachments that the Custodian could not access, therefore it was impossible for the Custodian to disclose them. The Custodian, in a separate certification, certified that she disclosed all attachments to the e-mails that the agency had in its possession and were accessible on an informal basis; the Custodian did not certify that it was impossible to disclose some of the attachments and the Custodian did not incorporate Counsel’s statement to this effect in her certification. The contingencies concerning disclosure of the attachments in the Custodian’s certified statement leave lingering issues with respect to full disclosure of the attachments.

Accordingly, the Custodian shall disclose to the Complainant all attachments to the e-mails responsive to the request that have not already been disclosed, unless the Custodian cannot open or otherwise retrieve any such attachment, in which case the Custodian shall state with specificity the reason such attachment cannot be disclosed to the Complainant.

The Complainant alleged that one (1) e-mail was improperly redacted (the e-mail in controversy is identified in Table 1 above). The Complainant stated that the e-mail is marked as archived and therefore it is a government record. The Complainant asserted that she is entitled to view the record in its entirety.

The Custodian’s Counsel agreed with the Complainant that said e-mail is a government record. Counsel stated that it was redacted to remove information that should not be disclosed to the public. Counsel further stated that the legal reason for the redaction was provided to the Complainant. The Custodian certified that the redactions to all of the disclosed documents were made after consultation with legal counsel. The Custodian also certified that she noted the legal basis for each redaction. The GRC was not provided with the legal reason for the redaction made to this particular record.

In Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005), the Complainant appealed a final decision of the GRC<sup>16</sup> in which the GRC

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<sup>16</sup> Paff v. NJ Department of Labor, Board of Review, GRC Complaint No. 2003-128 (October 2005). Nancy Lewen v. Robbinsville Public School District (Mercer), 2008-211 – Findings and Recommendations of the Executive Director

dismissed the complaint by accepting the Custodian's legal conclusion for the denial of access without further review. The court stated that:

“OPRA contemplates the GRC’s meaningful review of the basis for an agency’s decision to withhold government records...When the GRC decides to proceed with an investigation and hearing, the custodian may present evidence and argument, but the GRC is not required to accept as adequate whatever the agency offers.”

The court also stated that:

“[t]he statute also contemplates the GRC’s *in camera* review of the records that an agency asserts are protected when such review is necessary to a determination of the validity of a claimed exemption. Although OPRA subjects the GRC to the provisions of the ‘Open Public Meetings Act,’ N.J.S.A. 10:4-6 to -21, it also provides that the GRC ‘may go into closed session during that portion of any proceeding during which the contents of a contested record would be disclosed.’ N.J.S.A. 47:1A-7f. This provision would be unnecessary if the Legislature did not intend to permit *in camera* review.”

Further, the court stated that:

“[w]e hold only that the GRC has and should exercise its discretion to conduct *in camera* review when necessary to resolution of the appeal...There is no reason for concern about unauthorized disclosure of exempt documents or privileged information as a result of *in camera* review by the GRC. The GRC’s obligation to maintain confidentiality and avoid disclosure of exempt material is implicit in N.J.S.A. 47:1A-7f, which provides for closed meeting when necessary to avoid disclosure before resolution of a contested claim of exemption.”

Therefore, pursuant to Paff, supra, the GRC must conduct an *in camera* review of the record listed in Table 1 to determine the validity of the assertion by the Custodian that the record was not unreasonably redacted.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. Because the Complainant’s request specifically identified the e-mails sought by recipient or sender, by date range and by content, and because Custodian John Szabo by using the given criteria was able to identify the records responsive to the Complainant’s request, said request is not overly broad or invalid and Custodian John Szabo has failed to bear his burden of proof that the denial of access to the requested records was authorized by law in accord with N.J.S.A. 47:1A-6. *See also* Courier Post v. Lenape Regional High School District, 360 N.J.Super. 191, 206 (Law Div. 2002) and Sandoval v. NJ State Parole Board, GRC Complaint No. 2006-167 (October 2008).



2. The Custodian shall disclose to the Complainant all attachments to the e-mails responsive to the request that have not already been disclosed, unless the Custodian cannot open or otherwise retrieve any such attachment, in which case the Custodian shall state with specificity the reason such attachment cannot be disclosed to the Complainant.
3. **The Custodian shall comply with item #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, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4<sup>17</sup>, to the Executive Director.**
4. Pursuant to Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005), the GRC must conduct an *in camera* review of the record listed in Table 1, an e-mail from Kathie Foster to Helen Payne dated November 12, 2007, to determine the validity of the assertion by the Custodian that the record was not unreasonably redacted.
5. **The Custodian must deliver<sup>18</sup> to the Council in a sealed envelope nine (9) copies of the requested unredacted documents (see #4 above), a document or redaction index<sup>19</sup>, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,<sup>20</sup> that the documents provided are the documents requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**
6. The Council defers analysis of whether either or both Custodians 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.

Prepared By: John E. Stewart  
Case Manager/*In Camera* Attorney

Approved By: Catherine Starghill, Esq.  
Executive Director

December 9, 2009

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<sup>17</sup> "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."

<sup>18</sup> The *in camera* documents may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as they arrive at the GRC office by the deadline.

<sup>19</sup> The document or redaction index should identify the document and/or each redaction asserted and the lawful basis for the denial.

<sup>20</sup> "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."