



State of New Jersey  
GOVERNMENT RECORDS COUNCIL

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CHRIS CHRISTIE  
Governor

KIM GUADAGNO  
Lt. Governor

RICHARD E. CONSTABLE, III  
Acting Commissioner

**FINAL DECISION**

**February 28, 2012 Government Records Council Meeting**

J.C.

Complaint No. 2008-91

Complainant

v.

New Jersey Department of Education

Custodian of Record

At the February 28, 2012 public meeting, the Government Records Council (“Council”) considered the February 21, 2012 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council, by a majority vote, adopted the entirety of said findings and recommendations. The Council, therefore, finds that:

1. Because it is reasonable that a custodian would seek legal advice prior to responding to a request for records, and because the OPRA Administrator provided the Complainant with a written response within the statutorily mandated seven (7) business days seeking an extension of time, as well as because the OPRA Administrator provided an anticipated deadline date and adhered to said deadline, the OPRA Administrator properly requested an extension of time pursuant to N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i.
2. Although the OPRA Administrator on behalf of the Custodian provided a written response to the Complainant denying access to the Complainant’s OPRA request within the extended deadline date, said response is insufficient pursuant to N.J.S.A. 47:1A-5.g. and Paff v. Willingboro Board of Education (Burlington), GRC Complaint No. 2007-272 (May 2008), because he failed to respond to each request item individually.
3. Because the Custodian certified that there are no records responsive to Item No. 1 of the Complainant’s OPRA request, and the Complainant has failed to provide any relevant evidence to contradict the Custodian’s certification, the Custodian has borne his burden of proving a lawful denial of access pursuant to N.J.S.A. 47:1A-6 and Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).
4. Because the Governor’s School of Engineering and Technology (“GSET”) program is a summer program hosted by a New Jersey institution of higher education, the requested student applications for the GSET program are considered individual admission applications with regard to any public institution of higher education and are exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1. As such, the Custodian



has not unlawfully denied access to request Item No. 2, despite his insufficient response to said request.

5. Because the Complainant's OPRA requests No. 3-4 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), Bent v. Stafford Police Department, 381 N.J. Super. 30 (App. Div. 2005), New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007), and Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).
6. Because the Custodian certified that there are no records responsive to Item No. 5 of the Complainant's OPRA request, and the Complainant has failed to provide any evidence to contradict the Custodian's certification, the Custodian has borne his burden of proving a lawful denial of access pursuant to N.J.S.A. 47:1A-6 and Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).
7. Although the Custodian's response to the Complainant's OPRA request was insufficient pursuant to N.J.S.A. 47:1A-5.g. and Paff v. Willingboro Board of Education (Burlington), GRC Complaint No. 2007-272 (May 2008) because he failed to respond to each request item individually, the Custodian did not unlawfully deny access to the Complainant's OPRA request because the requested records either do not exist, are exempt from disclosure, or the request items are invalid. As such, 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 28<sup>th</sup> Day of February, 2012

Robin Berg Tabakin, Esq., Chair  
Government Records Council

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

Denise Parkinson Vetti, Esq., Secretary  
Government Records Council  
**Decision Distribution Date: March 5, 2012**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
February 28, 2012 Council Meeting**

**J.C.<sup>1</sup>  
Complainant**

**GRC Complaint No. 2008-91**

**v.**

**New Jersey Department of Education<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:**

1. Complete applications of the twelve (12) finalists submitted to the 2005-2006 Governor's School of Engineering and Technology ("GSET"). The finalists are: A.B., N.B., I.D., S.D., A.D., A.D., J.J., M.K., E.L., J.L., B.L., and V.M.<sup>3</sup>
2. Complete applications of the four (4) candidates who were not selected by the Somerset County Office of the New Jersey Department of Education as finalists for GSET. The candidates are: L.P., J.S., I.S., and S.S.<sup>4</sup>
3. All documentation provided to, or received from, Mr. Paul Murchison, the judge responsible for selecting the GSET finalists, regarding the 2005-2006 selection.
4. All correspondence between Judges Paul Murchison, Tulsi Maharjan, David Bausmith, Peter Palmer, and Sarah Murchison and the Somerset County Office of the New Jersey Department of Education regarding any subjects relating to New Jersey Governor's Schools.
5. The policy indicating that the evaluation sheets, also called County Review Criteria, completed by the judges during their selection of the finalists, are destroyed by the judges after their selections are made.

**Request Made:** April 15, 2008

**Response Made:** April 24, 2008 and April 28, 2008

**Custodian:** John J. Hart<sup>5</sup>

**GRC Complaint Filed:** May 6, 2008<sup>6</sup>

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

<sup>2</sup> Represented by DAG Susan Huntley, on behalf of the NJ Attorney General.

<sup>3</sup> The Complainant identified said individuals by first initial and last name; however, the GRC declines to provide the names of said individuals because they appear to be minors.

<sup>4</sup> The Complainant identified said individuals by first initial and last name; however, the GRC declines to provide the names of said individuals because they appear to be minors.

<sup>5</sup> John J. Hart was the Custodian at the time of the OPRA request and Denial of Access Complaint. However, the current Custodian is Maria Casale.

<sup>6</sup> The GRC received the Denial of Access Complaint on said date.

## Background

### **April 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.

### **April 24, 2008**

E-mail from Anthony D'Elia, OPRA Administrator to Complainant. The OPRA Administrator responds in writing to the Complainant's OPRA request on the seventh (7<sup>th</sup>) business day following receipt of such request. The OPRA Administrator states that the Complainant's OPRA request is currently under legal review. The OPRA Administrator states that he expects to provide the Complainant with a determination within three (3) business days.

### **April 28, 2008**

OPRA Administrator's response to the OPRA request on behalf of the Custodian. The OPRA Administrator responds in writing to the Complainant's OPRA request on the ninth (9<sup>th</sup>) business day following receipt of such request. The OPRA Administrator states that access to the requested records is denied because the records responsive to the Complainant's request have been destroyed, have been provided to the State's attorneys during prior discovery requests, or are exempt from disclosure under the Family Educational Rights and Privacy Act ("FERPA").

### **May 6, 2008**

Denial of Access Complaint filed with the Government Records Council ("GRC") with the following attachments:

- E-mail from OPRA Administrator to Complainant dated April 24, 2008
- Custodian's response to the Complainant's OPRA request dated April 28, 2008

The Complainant states that she submitted her OPRA request through the OPRA Central website on April 15, 2008. The Complainant states that on April 24, 2008, the seventh (7<sup>th</sup>) business day following the date of her OPRA request, she received an e-mail from the OPRA Administrator which neither granted nor denied access to her request. As such, the Complainant contends that the OPRA Administrator violated OPRA. The Complainant also states that she received another e-mail from the OPRA Administrator on behalf of the Custodian dated April 28, 2008. The Complainant states that in said e-mail, the OPRA Administrator denied her OPRA request on the basis that the requested records do not exist, have been provided to the State's attorneys via discovery, or are exempt from public access under FERPA.

The Complainant asserts that the New Jersey Department of Education's ("DOE") response fails to identify any specific records that are claimed to be exempt from disclosure. The Complainant contends that said response is deliberately obscure. The Complainant states that pursuant to OPRA, the burden of proving a lawful denial of access rests upon the custodian. The Complainant asserts that the Custodian's wholesale

denial of her OPRA request is unlawful. Additionally, the Complainant contends that the Custodian's denial of her request is arbitrary, capricious, intentional and malicious.

Further, the Complainant requests the following relief from the Council:

1. A finding that the Custodian's failure to grant or deny access to the Complainant's OPRA request within the statutorily mandated seven (7) business days is a violation of OPRA.
2. A finding that the Custodian's violation of OPRA is deliberate and malicious.
3. An order compelling the Custodian to comply with OPRA, the court's decision in Paff v. NJ Department of Labor, 392 N.J. Super. 334 (App. Div. 2007), and all other applicable law and case precedents.
4. An order compelling the Custodian to disclose all records responsive to her OPRA request.

#### **June 4, 2008**

E-mail from Complainant to OPRA Administrator. The Complainant requests that the OPRA Administrator provide the following:

1. A list identifying which records responsive to her OPRA request have been provided to the State's attorneys in prior discovery requests and the person to whom said records were provided.
2. A list identifying which records responsive to her OPRA request no longer exist and the date on which said records were destroyed in accordance with the Records Destruction Schedule established and approved by the New Jersey Department of State, Division of Archives and Records Management.
3. A list identifying which records responsive to her OPRA request are exempt from public access under FERPA and provide the specific legal basis.
4. A list identifying the information contained in any records responsive that is protected by FERPA and why said records cannot be released.

Additionally, the Complainant states that she is forwarding this e-mail to Melissa Dutton, Jennifer Campbell, and Joyce Atkins at the Division of Law and asks that they indicate whether they are in possession of any records claimed to have been provided to the State's attorneys.

#### **July 1, 2008**

Offer of Mediation sent to both parties.

#### **July 7, 2008**

Custodian's signed Agreement to Mediate.

#### **July 10, 2008**

E-mail from Complainant to GRC. The Complainant requests that the GRC begin a full investigation of this complaint. The Complainant states that she e-mailed all parties on June 4, 2008 and has not received any response. The Complainant asserts that the Custodian's failure to respond indicates that the DOE has no intention of resolving this matter.

**July 11, 2008**

E-mail from Complainant to GRC. The Complainant asserts that the Custodian failed to comply with the requirements of Paff v. NJ Department of Labor, 392 N.J. Super. 334 (App. Div. 2007).<sup>7</sup> The Complainant contends that the Custodian's denial of her request on the basis that some records have been provided to the State's attorneys is unlawful. Additionally, the Complainant claims that the Custodian failed to bear his burden of proving a lawful denial of access to the records withheld from disclosure pursuant to FEPPA or because said records no longer exist.

The Complainant declines mediation and requests that the GRC begin a full investigation of this complaint unless the Custodian discloses all records responsive. Specifically, the Complainant requests that the Custodian provide access to all records responsive to her OPRA request and respond to her e-mail dated June 4, 2008. The Complainant states that if the Custodian complies with her request within three (3) business days, she would be willing to participate in mediation.

**August 13, 2008**

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

**August 19, 2008**

Custodian's SOI with the following attachments:

- Letter from Beverly Hetrick to Paul Murchison dated July 12, 2006
- Letter from Beverly Hetrick to David Bausmith dated July 12, 2006
- Letter from Beverly Hetrick to Peter Palmer dated July 12, 2006
- Letter from Beverly Hetrick to Tulsi Maharjan dated July 12, 2006
- Letter from Beverly Hetrick to Sarah Murchison dated July 12, 2006
- Complainant's OPRA request dated April 15, 2008
- OPRA Request Confirmation Receipt dated April 15, 2008
- E-mail from OPRA Administrator to Complainant dated April 24, 2008
- OPRA Administrator's response to the Complainant's OPRA request on behalf of the Custodian dated April 28, 2008

The original Custodian certifies that he received the Complainant's OPRA request on April 15, 2008. The Custodian states that the OPRA Administrator responded to the Complainant via e-mail dated April 24, 2008 and indicated that the DOE needed additional time to seek legal advice. The Custodian certifies that he contacted Ms. Beverly Hetrick of the Somerset County Office of Education regarding the Complainant's OPRA request. The Custodian states that Ms. Hetrick reviewed the records in her possession and contacted the DOE with her findings. The Custodian certifies that he denied the Complainant's OPRA request via e-mail dated April 28, 2008.

Further, the Custodian certifies that the DOE does not maintain any records responsive to Item No. 1 of the Complainant's OPRA request. The Custodian certifies that the DOE forwarded said records to GSET. The Custodian certifies that no copies are

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<sup>7</sup> This court decision requires custodians to complete a document index when responding to Denial of Access Complaints filed with the GRC.

kept in the County Office but that they would be exempt from disclosure under FERPA had said applications been maintained.

The Custodian asserts that the four (4) application packets responsive to Item No. 2 of the Complainant's OPRA request are exempt from disclosure pursuant to FERPA and N.J.S.A. 47:1A-1. The Custodian certifies that the DOE does not maintain any releases signed by the parents/applicants. The Custodian certifies that said applications must be retained for three (3) years.

The Custodian certifies that the records listed below are responsive to Item No. 3 of the Complainant's OPRA request:

1. County Review Criteria Checklist – provided to Complainant on numerous occasions, as early as April 12, 2007.
2. Governor's School overview and timelines - record attached to the SOI.
3. Four (4) application packets - exempt from disclosure pursuant to FERPA and N.J.S.A. 47:1A-1.
4. Letter from Paul Murchinson to David Livingston dated July 23, 2006 – provided to Complainant on May 16, 2008 and attached to the SOI.
5. Letter from Beverly Hetrick to Paul Murchison – records attached to SOI. The existence of this letter was not determined until August 20, 2008.

Additionally, the Custodian certifies that the following record is responsive to Item No. 4 of the Complainant's OPRA request: letter from Beverly Hetrick to the four (4) judges named in the request. The Custodian certifies that a copy of the draft letter sent to the Judges was provided to the Complainant on April 28, 2008. However, the Custodian also certifies that the existence of the letters sent to the named judges was not determined until August 20, 2008. The Custodian also attaches the records to the SOI.

The Custodian also certifies that there are no records responsive to Item No. 5 of the Complainant's OPRA request.<sup>8</sup>

### **August 27, 2008**

E-mail from Complainant to GRC. The Complainant states that she is not in receipt of the Custodian's SOI. The Complainant claims that she is therefore entitled to a default judgment against the DOE for its failure to respond to this complaint. The Complainant requests that the GRC adjudicate this complaint based solely on the information submitted in her Denial of Access Complaint and order the Custodian to release all records responsive to her OPRA request.

### **August 28, 2008**

E-mail from GRC to Complainant. The GRC forwards the Custodian's SOI to the Complainant. Additionally, the GRC forwards an e-mail from the Custodian's Counsel

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<sup>8</sup> The Custodian did not certify to the search undertaken to locate the records responsive or whether any records responsive to the Complainant's OPRA request were destroyed in accordance with the Records Destruction Schedule established and approved by New Jersey Department of State, Division of Archives and Records Management as is required pursuant to Paff v. NJ Department of Labor, 392 N.J. Super. 334 (App. Div. 2007).

to the GRC dated April 21, 2008 in which Counsel indicates that the DOE provided the Complainant with the SOI. The GRC states that it does not enter a default judgment against a custodian who fails to submit an SOI. The GRC states that although the GRC *may* adjudicate the matter based solely on the information submitted by the Complainant, the GRC still conducts a full legal analysis to determine whether the requested records are legally required to be disclosed under OPRA.

#### **August 29, 2008**

E-mail from Complainant to Custodian and Custodian's Counsel. The Complainant states that the DOE indicated to the GRC via e-mail dated August 21, 2008 that it provided the Complainant with a copy of the SOI. However, the Complainant asserts that she did not receive the SOI. The Complainant claims that the DOE's statement to the GRC is false. The Complainant requests proof that the DOE sent her the SOI.

#### **September 2, 2008**

E-mail from Custodian's Counsel to Complainant. Counsel states that upon further review of her e-mail to the GRC dated August 21, 2008, it appears as though the Complainant was inadvertently left out of the distribution list. Counsel states that her August 21, 2008 e-mail clearly indicates that the SOI was supposed to be provided to the Complainant and that the failure to do so was a mistake. Counsel attaches the SOI to this e-mail.

#### **September 23, 2008**

The Complainant's response to the Custodian's SOI. The Complainant states that the Custodian certifies that he provided the Complainant with a copy of the SOI simultaneously with it being provided to the GRC. The Complainant states that the Custodian failed to provide her with the SOI simultaneously. The Complainant contends that the DOE made a false claim that it sent the SOI to her. Specifically, the Complainant states that the August 21, 2008 e-mail, in which the DOE allegedly forwarded the SOI to the Complainant, does not include the Complainant's e-mail address or a copy of the SOI. Additionally, the Complainant states that the DOE was unable to provide any evidence to prove that it sent her the SOI prior to September 2, 2008.

Further, the Complainant states pursuant to N.J.S.A. 47:1A-5.i., a custodian must either grant or deny access to an OPRA request within seven (7) business days from receipt of said request. The Complainant asserts that the Custodian failed to adhere to said provision and is in violation of OPRA. The Complainant also states that N.J.S.A. 47:1A-5.g. mandates that a custodian indicate the specific legal basis for a denial of access on the request form and return said form to the requestor. The Complainant contends that the Custodian failed to do so and is in violation of OPRA.

The Complainant also states that the Custodian failed to specifically set forth the last date on which any records responsive to the Complainant's OPRA request were destroyed, as is required in the Custodian's SOI. The Complainant contends that the Custodian must complete said section since part of the denial is based on the assertion that some records no longer exist.



Additionally, the Complainant asserts that the Custodian lied when he certified that the DOE forwarded original copies of the finalists' applications to GSET and thus the DOE does not maintain said applications. The Complainant states that it is unreasonable that the DOE would mail out original applications without keeping a copy. The Complainant contends that the Custodian failed to bear his burden of proving that the requested records no longer exist and that no government policies require the County Office to keep copies of said records. The Complainant states that the Custodian admitted that it must keep copies of student applications for three (3) years. The Complainant asserts that GSET is under the management of the DOE and a diligent search for the requested records would include GSET's files.

Additionally, the Custodian states that the Custodian indicated in his SOI that he provided records to the Complainant on April 28, 2008. The Complainant asserts that the Custodian's statement is false; the Complainant contends that she did not receive any records on April 28, 2008, except for the OPRA Administrator's denial e-mail. The Complainant also claims that the Custodian never provided her with a copy of the County Review Criteria Checklist as the Custodian indicated in his SOI.

The Complainant also contends that the Custodian's certification that the County Review Criteria Checklist was provided to the Complainant on numerous occasions, as early as April 12, 2007, is false. The Complainant states that the Custodian certified that the County Review Criteria Checklists completed by the judges have been destroyed, and thus have not been provided to the Complainant. The Complainant states the Custodian only provided a copy of a blank County Review Criteria Checklist, which the Custodian never claimed before was part of the correspondence between Mr. Murchison and the County Office. The Complainant asserts that the DOE disclosed and withheld records as it pleased with no regard for the law.

Further, the Complainant states that the Custodian disclosed a letter from Mr. Murchison to Mr. Livingston dated July 23, 2006. The Complainant contends that the text of said letter suggests that there were other pieces of correspondence between the parties that the Custodian withheld from disclosure. Additionally, the Complainant contends that it is irrational to believe that the judges did not communicate with the County Office during the process of evaluating the County nominees for GSET. The Complainant asserts that the Custodian unlawfully denied access to said correspondence.

The Complainant also states that the five (5) letters from Ms. Hetrick to the judges indicate that there are attachments to said letters. The Complainant states that she has not received any such attachments from the Custodian contrary to the Custodian's certification that the documents attached are true copies of all documents sent or received by the Custodian or the Custodian's staff. Further, the Complainant claims that it is not normal practice in business for Ms. Hetrick to fail to list the attachments in her letter. As such, the Complainant questions whether the letter is authentic.

Additionally, the Complainant contends that the Custodian failed to prove why the DOE is an agency to which FERPA applies, that GSET is an institution to which FERPA applies, and that each record withheld from disclosure falls into categories

protected under FERPA. The Complainant also claims that the Custodian failed to provide her with the non-exempt portions of the requested applications.

The Complainant also asserts that the Custodian failed to comply with the requirements of Paff, *supra*, regarding the required document index. The Complainant claims that the Custodian's SOI fails to identify in detail the records responsive to her OPRA request, and fails to adequately provide a privilege log. The Complainant asserts that such failure is willful conduct since the Custodian's response was reviewed by legal counsel. The Complainant requests that the GRC order the Custodian to disclose all records responsive to her OPRA request.

### **November 6, 2008**

Letter from Custodian's Counsel to GRC. Counsel states that the DOE provided the Complainant with the following redacted records via overnight mail on October 3, 2008 in response to a Request for the Production of Documents in an unrelated litigation matter.

1. L.P.'s GSET application packet, redacted to disclose only the applicant's contact information
2. I.S.'s GSET application packet, redacted to disclose only the applicant's contact information
3. J.S.'s GSET application packet, redacted to disclose only the applicant's contact information
4. S.S.'s GSET application packet, redacted to disclose only the applicant's contact information

### **November 13, 2008**

E-mail from GRC to Custodian's Counsel. The GRC states that OPRA requires a written response detailing the lawful basis for each redaction. The GRC requests that Counsel provide the specific lawful basis for the redactions made to the records provided to the Complainant by November 20, 2008.

### **November 21, 2008**

Letter from Custodian's Counsel to GRC. Counsel states that FERPA governs the accessibility and confidentiality of a student's education records. Counsel states that education records are records that directly relate to a student and are maintained by an educational agency or institution or by a party acting for the agency or institution. 20 U.S.C. § 1232g(b)(1), 34 C.F.R. § 99.3. Counsel states that with limited exceptions, FERPA prohibits the disclosure of personally identifiable information to third parties. 34 C.F.R. § 99.2. However, Counsel states that FERPA does allow an educational agency or institution to disclose personally identifiable information that has been designated as "directory information" pursuant to 34 C.F.R. § 99.37(b). Counsel states that directory information is defined as "information contained in an education record of a student that would not generally be considered harmful or an invasion of privacy if disclosed." 34 C.F.R. § 99.3. Counsel states that such directory information includes a student's name, address, and telephone listing. 20 U.S.C. § 1232g(a)(5)(A).

Counsel states that in this instant matter, the Complainant requested the complete applications of four (4) students who were Somerset County candidates for the GSET program in 2006. Counsel asserts that because said applications are education records held by the Office of the Executive County Superintendent of Somerset County, an educational institution, said records are exempt from public access under FERPA. As such, Counsel states that said records cannot be disclosed without redaction.

### **November 23, 2008**

E-mail from Complainant to GRC. The Complainant states that she is in receipt of the applications for the four (4) County nominees not chosen as finalists for the GSET program. The Complainant contends that the Custodian continues to unlawfully withhold access to the remaining requests. The Complainant claims that the Custodian admitted in his SOI that the DOE maintains copies of the twelve (12) applications for finalists but refused to release them on the basis that the County Office does not maintain said records.<sup>9</sup>

The Complainant asserts that the Custodian redacted the applications for the four (4) County nominees without providing the specific lawful basis for each redaction, as is required. The Complainant states that the DOE made a blanket statement that the applications are exempt under FERPA without any more detail. The Complainant states that the Custodian left blank spaces in the areas where redactions were made without any more information. The Complainant states that this makes it difficult for her to challenge the redactions. The Complainant contends that the DOE's failure to provide lawful basis for redactions is in bad faith.

The Complainant claims that GSET is a summer program and is not an educational agency or institution under FERPA. The Complainant asserts that if it were, it would be required to notify eligible students or parents of their rights under FERPA pursuant to 34 C.F.R. § 99.7; 20 U.S.C. § 1232g (e) and (f). The Complainant states that her child was an applicant for said program and received no notice of rights. The Complainant contends that the DOE's failure to provide such notification is an admission that the DOE and GSET violated FERPA. However, the Complainant also contends that failure to provide said notification is an admission that the DOE and GSET are not educational institutions protected under FERPA.

Further, the Complainant states that the Custodian released the complete application of the Complainant's child without redaction or any releases signed by the child or parent. The Complainant contends that if the DOE's assertion is valid, then it shall admit that it illegally released her child's application.

The Complainant requests that the GRC order the Custodian to release the requested applications except for the following sections, which the Complainant does not challenge:

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<sup>9</sup> The Custodian did not admit in his SOI that the DOE maintained copies of the requested twelve (12) applications; the Custodian listed said applications as records responsive to the Complainant's request and indicated that the DOE no longer maintains said records.

1. applicant's student ID
2. social security number
3. home telephone number
4. e-mail address
5. birth date
6. name of mother, father, or guardian

### Analysis

#### **Whether the Custodian timely and properly responded to the Complainant's OPRA request?**

OPRA provides that:

“[i]f the custodian is unable to comply with a request for access, the custodian shall indicate the specific basis therefor on the request form and promptly return it to the requestor. The custodian shall sign and date the form and provide the requestor with a copy thereof ...” N.J.S.A. 47:1A-5.g.

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...* In the event a custodian fails to respond within seven business days after receiving a request, *the failure to respond shall be deemed a denial of the request ...* If the government record is in storage or archived, the requestor shall be so *advised within seven business days* after the custodian *receives 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 mandates that a custodian must either grant or deny access to requested records within seven (7) business days from receipt of said request. N.J.S.A. 47:1A-5.i. As also prescribed under N.J.S.A. 47:1A-5.i., a custodian's failure to respond within the required seven (7) business days results in a “deemed” denial. Further, a custodian's response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5.g.<sup>10</sup> Thus, a custodian's failure to respond in writing to a complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11

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<sup>10</sup> It is the GRC's position that a custodian's written response either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, even if said response is not on the agency's official OPRA request form, is a valid response pursuant to OPRA.

(Interim Order October 31, 2007). Additionally, N.J.S.A. 47:1A-5.i. provides that if a custodian requires time beyond the statutorily mandated seven (7) business days to fulfill a request, the custodian must advise the requestor when the records can be made available; a custodian's failure to provide the records by said date results in a deemed denial.

In this instant complaint, the Custodian certified that he received the Complainant's OPRA request on April 15, 2008. The OPRA Administrator responded to the Complainant in writing on the seventh (7<sup>th</sup>) business day following the Custodian's receipt of said request, in which the OPRA Administrator requested a three (3) business day extension of time to seek legal review. The Custodian certified that he provided the Complainant with a written response on April 28, 2008, the second (2<sup>nd</sup>) business day within the three (3) business day extension of time, in which the Custodian denied access to the Complainant's request because the records responsive to the Complainant's request have been destroyed, have been provided to the State's attorneys during prior discovery requests, or are exempt from disclosure under FERPA.<sup>11</sup>

In Paff v. Bergen County Prosecutor's Office, GRC Complaint No. 2005-115 (March 2006), the Council held that:

“[a]lthough it is reasonable that a custodian would seek legal advice prior to responding to a request for records, the Custodian is still obligated to adhere to the provisions of OPRA. The Custodian could have tried to obtain a written agreement from the Complainant in order to extend the time period required to respond; however he failed to do so. This failure resulted in the Custodian's delay in a written response to the Complainant beyond the time period prescribed under OPRA.”

Therefore, because it is reasonable that a custodian would seek legal advice prior to responding to a request for records, and because the OPRA Administrator provided the Complainant with a written response within the statutorily mandated seven (7) business days seeking an extension of time, as well as because the OPRA Administrator provided an anticipated deadline date and adhered to said deadline, the OPRA Administrator properly requested an extension of time pursuant to N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i.

However, in the OPRA Administrator's written response dated April 28, 2008, the Administrator denied access to the Complainant's request on the grounds that the records responsive to the Complainant's request have been destroyed, have been provided to the State's attorneys during prior discovery requests, or are exempt from disclosure under FERPA. The Custodian failed to specifically identify which basis for the denial corresponds to which request item.

In Paff v. Willingboro Board of Education (Burlington), GRC Complaint No. 2007-272 (May 2008), the custodian failed to address each request item in his response to the complainant's OPRA request. The Council held that:

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<sup>11</sup> The OPRA Administrator sent the response on behalf of the Custodian.  
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“[a]lthough the Custodian responded in writing to the Complainant’s August 28, 2007 OPRA request within the statutorily mandated time frame pursuant to N.J.S.A. 47:1A-5.i., the Custodian’s response was legally insufficient because he failed to respond to each request item individually. Therefore, the Custodian has violated N.J.S.A. 47:1A-5.g.”

Therefore, although the Custodian provided a written response to the Complainant via the OPRA Administrator, denying access to the Complainant’s OPRA request within the extended deadline date, the Custodian’s response is insufficient pursuant to N.J.S.A. 47:1A-5.g. and Paff, *supra*, because he failed to respond to each request item individually.

### **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, 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 ...”A government record shall not include, with regard to any public institution of higher education, the following information which is deemed to be privileged and confidential...information contained on individual admission applications...” (Emphasis added.) N.J.S.A. 47:1A-1.1.

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.

### Complainant's OPRA Request Item No. 1

In Item No. 1 of the Complainant's OPRA request, the Complainant sought access to the complete applications of the twelve (12) finalists submitted to the 2005-2006 GSET program. The Custodian certifies that the DOE does not maintain any records responsive to said request. The Custodian certifies that the DOE forwarded said records to GSET. The Custodian certifies that no copies are kept in the County Office.

The Complainant states that it is unreasonable that the DOE would mail out original applications without keeping a copy. The Complainant contends that the Custodian failed to bear his burden of proving that the requested records no longer exist and that no government policies require the County Office to keep copies of said records. The Complainant states that the Custodian admitted that it must keep copies of student applications for three (3) years. The Complainant asserts that GSET is under the management of the DOE and a diligent search for the requested records would include GSET's files.

However, the GRC does not have any authority over whether the DOE has correctly followed its records retention policy, pursuant to N.J.S.A. 47:1A-7.b. and Toscano v. NJ Department of Labor, Division of Vocational Rehabilitation Services, GRC Complaint No. 2007-296 (March 2008)(holding that the Council does not have the authority to determine whether the NJ Division of Vocational Rehabilitation Services has correctly followed their records retention policy).

Additionally, pursuant to Executive Order No. 35 (Corzine 2006), "[t]he Governor's School Program shall be located in the Commission on Higher Education. The Governor's Board shall have general supervisory authority over the conduct of the Program..." The Commission on Higher Education was established by the Higher Education Restructuring Act of 1994, N.J.S.A. 18A:3B-1 et seq., and is not affiliated with the DOE. As such, the Custodian had no obligation under OPRA to contact other public agencies to locate the requested applications.

Further, in Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005), the GRC held that the custodian did not unlawfully deny access to he requested record because the custodian certified that no records responsive existed.

Therefore, because the Custodian certified that there are no records responsive to Item No. 1 of the Complainant's OPRA request, and the Complainant has failed to provide any relevant evidence to contradict the Custodian's certification, the Custodian has borne his burden of proving a lawful denial of access to Item No. 1 of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-6 and Pusterhofer, supra.

### Complainant's OPRA Request Item No. 2

In Item No. 2 of the Complainant's OPRA request, the Complainant sought access to the complete applications of the four (4) candidates who were not selected by the Somerset County Office of the DOE as finalists for the GSET program. The Custodian asserted that the requested applications are exempt from public access under FERPA.

However, on November 6, 2008, the Custodian's Counsel released redacted copies of said applications to the Complainant. The Custodian's Counsel contends that the redacted portions are exempt under FERPA with the exception of personally identifiable information that has been designated as "directory information" pursuant to 34 C.F.R. § 99.37(b).

The Complainant asserts that the Custodian failed to prove why the DOE is an agency to which FERPA applies, that GSET is an institution to which FERPA applies, and that each record withheld from disclosure falls into categories protected under FERPA.

FERPA exempts from public access educational records maintained by educational agencies or institutions. FERPA defines an educational agency or institution as "any public or private agency or institution which is the recipient of funds under any applicable program." 20 U.S.C.S. § 1232g(a)(3). In order for the Council to determine whether the DOE is an educational agency or institution under FERPA, the Council must interpret said statute. However, the Council does not have the authority to *interpret* other statutes; the Council can only *apply* other statutes as necessary.

Pursuant to N.J.S.A. 47:1A-9, the Council may apply and uphold an exemption contained in another State statute, regulation, Executive Order, etc. On numerous occasions the Council has utilized said provision of OPRA when a custodian has asserted that a government record is exempt from disclosure pursuant to a legal authority other than OPRA. However, in said instances, the exemption was clearly articulated in the other legal authority. Generally, a statute is read in accordance with its clear terms. *See DiProspero v. Penn.*, 183 N.J. 477, 492, 874 A.2d 1039 (2005). In this specific instance, the statute is not clear regarding whether the DOE is an educational agency or institution protected under FERPA and it is not within the Council's authority to make such determination.

Regardless of whether FERPA applies in this matter, OPRA applies to these particular records. The Council is permitted to raise defenses regarding the disclosure of records pursuant to Paff v. Township of Plainsboro, Docket No. A-2122-05T2 (App. Div. 2007).<sup>12</sup> In said case, the complainant challenged the GRC's authority to uphold a denial of access for reasons never raised by the custodian. Specifically, the Council did not uphold the basis for the redactions cited by the custodian. The Council, on its own initiative, determined that the Open Public Meetings Act prohibited the disclosure of the redacted portions to the requested executive session minutes. The Council affirmed the custodian's denial to portions of the executive session minutes but for reasons other than those cited by the custodian. The complainant argued that the GRC did not have the authority to do other than determine whether the custodian's cited basis for denial was lawful. The Court held that:

"[t]he GRC has an independent obligation to 'render a decision as to whether the record which is the subject of the complaint is a government record which must be made available for public access pursuant to' OPRA...The GRC is not limited to assessing the correctness of the

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<sup>12</sup> On appeal from Paff v. Township of Plainsboro, GRC Complaint No. 2005-29 (March 2006).  
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reasons given for the custodian's initial determination; it is charged with determining if the initial decision was correct.”

The Court further stated that:

“[a]side from the clear statutory mandate to decide if OPRA requires disclosure, the authority of a reviewing agency to affirm on reasons not advanced by the reviewed agency is well established. Cf. Bryant v. City of Atl. City, 309 N.J. Super. 596, 629-30 (App. Div. 1998) (citing Isko v. Planning Bd. Of Livingston, 51 N.J. 162, 175 (1968) (lower court decision may be affirmed for reasons other than those given below)); Dwyer v. Erie Inv. Co., 138 N.J. Super. 93, 98 (App. Div. 1975) (judgments must be affirmed even if lower court gives wrong reason), certif. denied, 70 N.J. 142 (1976); Bauer v. 141-149 Cedar Lane Holding Co., 42 N.J. Super. 110, 121 (App. Div. 1956) (question for reviewing court is propriety of action reviewed, not the reason for the action), aff'd, 24 N.J. 139 (1957).”

In this instant complaint, the records at issue are applications of the four (4) candidates who were not selected by the Somerset County Office of the DOE as finalists for the GSET program. Pursuant to Executive Order No. 35 (Corzine 2006), the “Governor’s School Program identifies high school students with high scholastic promise and matches them with intensive summer programs at New Jersey institutions of higher education where they are challenged to grow and learn in a focused, college-level, academic environment...” Said Executive Order creates the Governor’s School within the Commission on Higher Education. Additionally, the specific applications requested are titled “The Governor’s School of Engineering and Technology at Rutgers, The State University of New Jersey Summer 2006.” Rutgers University is an institution of higher education in the State of New Jersey.<sup>13</sup> Therefore, the requested applications are student applications to attend a program at an institution of higher education in the State of New Jersey.

OPRA exempts from disclosure information contained on individual admission applications with regard to any public institution of higher education. N.J.S.A. 47:1A-1.1. Said provision does not limit the exemption to only include student applications for full-time enrollment to the institution. Thus, regarding applications to the GSET program, in this case to attend Rutgers University, the OPRA exemption applies.

Therefore, because the GSET program is a summer program hosted by a New Jersey institution of higher education, the requested student applications for the GSET program are considered individual admission applications with regard to any public institution of higher education and are exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1. As such, the Custodian has not unlawfully denied access to request Item No. 2, despite his insufficient response to said request.

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<sup>13</sup> See, e.g., Rutgers Council of American Assoc. of University Professors v. New Jersey Board of Higher Education, 126 N.J. Super. 53 (App.Div. 1973).

### Complainant's OPRA Request Items No. 3-4

In Item No. 3 of the Complainant's OPRA request, the Complainant sought access to all documentation provided to, or received from, Mr. Paul Murchison, the judge responsible for selecting the GSET finalists, regarding the 2005-2006 selection. In Item No. 4 of said request, the Complainant sought access to all correspondence between Judges Paul Murchison, Tulsi Maharjan, David Bausmith, Peter Palmer, and Sarah Murchison and the Somerset County Office of the New Jersey Department of Education regarding any subjects relating to New Jersey Governor's Schools.

Both the courts and the Council have previously addressed the level of specificity required for an OPRA request to be considered valid. 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>14</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>15</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..."

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 No. 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 this instant complaint, Item No. 3 of the Complainant's request seeks "all documents" without reference to any particular type of record. The Complainant's

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<sup>14</sup> Affirmed on appeal regarding Bent v. Stafford Police Department, GRC Case No. 2004-78 (October 2004).

<sup>15</sup> As stated in Bent, *supra*.

request fails to identify a specific time period for the request, or any other party to the requested records. As for Item No. 4, while the Complainant specifically requests correspondence, she fails to identify a specific time period for the request, or any specific subject matter for the requested records. Items No. 3-4 of the Complainant's request require an open-ended search of the agency's records and fail to specifically identify with reasonable clarity the records sought.

Therefore, because the Complainant's OPRA requests No. 3-4 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, *supra*, Bent, *supra*, NJ Builders, *supra*, and Schuler, *supra*.

#### Complainant's OPRA Request Item No. 5

In Item No. 5 of the Complainant's OPRA request, the Complainant sought access to the written policy indicating that the evaluation sheets, also called County Review Criteria, completed by the judges during their selection of the finalists are destroyed by the judges after their selections are made. In this Custodian's SOI dated August 19, 2008, the Custodian certified that there are no records responsive to Item No. 5 of the Complainant's OPRA request.

Therefore, because the Custodian in this complaint certified that there are no records responsive to Item No. 5 of the Complainant's OPRA request, and the Complainant has failed to provide any evidence to contradict the Custodian's certification, the Custodian has borne his burden of proving a lawful denial of access pursuant to N.J.S.A. 47:1A-6 and Pusterhofer, *supra*.

#### **Whether the Custodian's actions rise 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.

The Complainant contends that the Custodian unlawfully denied access to her OPRA request. The Complainant contends that the Custodian's response to her request

was deliberately obscure. Additionally, the Complainant contends that the Custodian's denial of her request is arbitrary, capricious, intentional and malicious. Further, the Complainant contends that the DOE's failure to provide lawful basis for the redactions made to the requested applications is in bad faith.

However, the Custodian carried his burden of proving a lawful denial of access to Item No. 1 of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-6. The Custodian has not unlawfully denied access to request Item No. 2, despite his insufficient response to said request. Additionally, the Custodian has not unlawfully denied access to requests No. 3-4 because said requests are not requests for identifiable government records and are invalid. Further, the Custodian carried his burden of proving a lawful denial of access to Item No. 5 of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-6.

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's response to the Complainant's OPRA request was insufficient pursuant to N.J.S.A. 47:1A-5.g. and Paff v. Willingboro Board of Education (Burlington), GRC Complaint No. 2007-272 (May 2008) because he failed to respond to each request item individually, the Custodian did not unlawfully deny access to the Complainant's OPRA request because the requested records either do not exist, are exempt from disclosure, or the request items are invalid. As such, 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 it is reasonable that a custodian would seek legal advice prior to responding to a request for records, and because the OPRA Administrator provided the Complainant with a written response within the statutorily mandated seven (7) business days seeking an extension of time, as well as because the OPRA Administrator provided an anticipated deadline date and adhered to said deadline, the OPRA Administrator properly requested an extension of time pursuant to N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i.

2. Although the OPRA Administrator on behalf of the Custodian provided a written response to the Complainant denying access to the Complainant's OPRA request within the extended deadline date, said response is insufficient pursuant to N.J.S.A. 47:1A-5.g. and Paff v. Willingboro Board of Education (Burlington), GRC Complaint No. 2007-272 (May 2008), because he failed to respond to each request item individually.
3. Because the Custodian certified that there are no records responsive to Item No. 1 of the Complainant's OPRA request, and the Complainant has failed to provide any relevant evidence to contradict the Custodian's certification, the Custodian has borne his burden of proving a lawful denial of access pursuant to N.J.S.A. 47:1A-6 and Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).
4. Because the Governor's School of Engineering and Technology ("GSET") program is a summer program hosted by a New Jersey institution of higher education, the requested student applications for the GSET program are considered individual admission applications with regard to any public institution of higher education and are exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1. As such, the Custodian has not unlawfully denied access to request Item No. 2, despite his insufficient response to said request.
5. Because the Complainant's OPRA requests No. 3-4 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), Bent v. Stafford Police Department, 381 N.J. Super. 30 (App. Div. 2005), New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007), and Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).
6. Because the Custodian certified that there are no records responsive to Item No. 5 of the Complainant's OPRA request, and the Complainant has failed to provide any evidence to contradict the Custodian's certification, the Custodian has borne his burden of proving a lawful denial of access pursuant to N.J.S.A. 47:1A-6 and Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).
7. Although the Custodian's response to the Complainant's OPRA request was insufficient pursuant to N.J.S.A. 47:1A-5.g. and Paff v. Willingboro Board of Education (Burlington), GRC Complaint No. 2007-272 (May 2008) because he failed to respond to each request item individually, the Custodian did not unlawfully deny access to the Complainant's OPRA request because the requested records either do not exist, are exempt from disclosure, or the request items are invalid. As such, 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: Dara Lownie  
Communications Manager

Approved By: Catherine Starghill, Esq.  
Executive Director

February 21, 2012<sup>16</sup>

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<sup>16</sup> This complaint was prepared for adjudication on October 21, 2009; however, said complaint was not adjudicated due to the Council's lack of quorum.  
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