



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

RICHARD E. CONSTABLE, III
Acting Commissioner

FINAL DECISION

March 27, 2012 Government Records Council Meeting

Sabino Valdes
Complainant

Complaint No. 2010-218

v.

Union City Board of Education (Hudson)
Custodian of Record

At the March 27, 2012 public meeting, the Government Records Council (“Council”) considered the March 20, 2012 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 response to the Complainant’s OPRA request failed to specify a lawful basis for a denial to the records sought in the OPRA request at issue herein but merely stated that the only page of responsive record that could be located had already been provided to the Complainant, the Custodian’s response to the Complainant’s request was insufficient pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Caggiano v. Borough of Stanhope (Sussex), GRC Complaint No. 2005-211 (January 2006).
2. Because the Custodian herein certified in the Statement of Information that the executive session minutes could not be located and because the Complainant submitted no competent, credible evidence to refute the Custodian’s certification, the Custodian has borne his burden of proving that he did not unlawfully deny access to the requested executive session minutes dated June 13, 2000 pursuant to N.J.S.A. 47:1A-6, Rivera v. Union City Board of Education (Hudson), GRC Complaint No. 2008-112 (August 2009) and Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).
3. The Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. by providing an insufficient response to the Complainant’s OPRA request because the Custodian did not provide a lawful basis for the denial of access to the requested records. However, the Custodian certified in the SOI that the requested executive session minutes could not be located after an extensive search. 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 an 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 27th Day of March, 2012

Robin Berg Tabakin, Chair
Government Records Council

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

Catherine Starghill, Executive Director
Government Records Council

Decision Distribution Date: April 5, 2012

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
March 27, 2012 Council Meeting**

**Sabino Valdes¹
Complainant**

GRC Complaint No. 2010-218

v.

**Union City Board of Education (Hudson)²
Custodian of Records**

Records Relevant to Complaint: Copy of the executive session minutes from the Union City Board of Education (“UCBOE”) meeting on June 13, 2000.

Request Made: August 2, 2010

Response Made: August 10, 2010

Custodian: Anthony Dragona

GRC Complaint Filed: August 19, 2010³

Background

August 2, 2010

Complainant’s Open Public Records Act (“OPRA”) request. The Complainant requests the record relevant to this complaint listed above on an official OPRA request form. The Complainant states that on May 30, 2008, prior to this request, the Custodian was able to locate one (1) page of the executive session minutes held on June 13, 2000. The Complainant also states that he was provided with a copy of this page at that time. The Complainant further states that at that time, the Custodian stated that he would continue to search for the complete set of executive session minutes dated June 13, 2000.

August 10, 2010

Custodian’s response to the OPRA request. The Custodian responds in writing to the Complainant’s OPRA request on the sixth (6th) business day following receipt of such request. The Custodian states that access to the requested record is denied because the only page of the requested executive session minutes that can be located was already provided to the Complainant.

August 19, 2010

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

¹ No legal representation listed on record.

² Represented by Susanne Lavelle, Esq. (Union City, NJ).

³ The GRC received the Denial of Access Complaint on said date.

- Complainant's OPRA request dated August 2, 2010
- Custodian's response to the Complainant's OPRA request dated August 10, 2000.
- A copy of one (1) page of the UCBOE executive session minutes dated June 13, 2000.

The Complainant states that on February 19, 2008 he filed an OPRA request seeking a copy of the executive session minutes from a UCBOE Special Meeting held on June 13, 2000.⁴ The Complainant also states that the Custodian requested an extension of time to locate these minutes. The Complainant further states that on May 30, 2008 the Custodian located one (1) page of such executive session minutes. The Complainant asserts that the Custodian stated that he would continue to search files in storage to locate a copy of the complete minutes and, if located, would provide a copy of said minutes to the Complainant.

The Complainant states that on August 4, 2008 he filed a second (2nd) OPRA request⁵ seeking the same executive session minutes as sought herein. The Complainant also states that the Custodian denied access to the record requested in the OPRA request dated August 4, 2008. The Complainant further states that on August 7, 2008 the Custodian responded to said request stating that a copy of the requested minutes could not be located. The Complainant states that on August 2, 2010 he filed the instant OPRA request seeking a copy of the executive session minutes of the UCBOE meeting held on June 13, 2000. The Complainant states that the Custodian responded to the instant OPRA request on August 10, 2010 stating that "the only page of these minutes that can be located was already provided."

The Complainant states that the executive session minutes which are the subject of this complaint were also the subject of Rivera v. Union City Board of Education (Hudson), GRC Complaint No. 2008-112 (April 2010). The Complainant states that in Rivera, the complainant filed an OPRA request seeking the UCBOE Special Meeting minutes dated June 13, 2000. The Complainant further states that the Council held that:

"[b]ecause the Custodian conducted a reasonable search for the requested special meeting minutes in the Board of Education's ledger minutes book and six (6) archived boxes, and because the Custodian certified that he was not aware of the existence or the contents of the box labeled "Nancy's copies" in which the Custodian's assistant located portions of the requested minutes, the Custodian did not unlawfully deny access to said minutes and has borne his burden of proving his due diligence in searching for said records pursuant to N.J.S.A. 47:1A-6."

The Complainant states that the majority of the requested executive session minutes dated June 13, 2000 were never located. The Complainant also states that agencies must permanently retain minutes. The Complainant further asserts that pursuant

⁴ It appears from the evidence of record that the Complainant's OPRA request dated February 19, 2008 sought the same record as in the present complaint. Said request is not the subject of the present Denial of Access Complaint.

⁵ Such request is not at issue in the present complaint.

to N.J.S.A. 47:1-14 “no official responsible for maintaining public records or the custodian thereof shall destroy, obliterate or dispose of any paper, document, instrument...no law, statute or regulation shall be construed to permit the destruction, obliteration or disposal of any such records by implication.” The Complainant asserts that pursuant to N.J.S.A. 47:3-17 “no person shall destroy...or otherwise dispose of any public record...which are under his control or in his care or custody...without first having advised the Bureau of Archives and History in the Department of Education...”

The Complainant states that the Custodian’s tenure predates the June 13, 2000 executive session meeting. The Complainant asserts that the June 13, 2000 executive session minutes were illegally destroyed. The Complainant argues that if the requested executive session minutes cannot be located, the GRC must hold someone accountable.

The Complainant requests that the GRC order the Custodian to produce the missing minutes from the June 13, 2000 executive session meeting. The Complainant also requests that the GRC inform the proper authorities if said minutes cannot be located.

The Complainant does not agree to mediate this complaint.

August 31, 2010

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

September 9, 2010

Custodian’s SOI with the following attachments:

- Complainant’s OPRA request dated August 2, 2010
- Custodian’s response to the Complainant’s OPRA request dated August 10, 2010.⁶

The Custodian certifies that executive session minutes must be maintained permanently in accordance with the Records Destruction Schedule established and approved by New Jersey Department of State, Division of Archives and Records Management (“DARM”).

The Custodian certifies that he received the Complainant’s OPRA request on August 2, 2010. The Custodian also certifies that he responded to the Complainant’s request on August 10, 2010 denying access to the record requested because the only page of the executive session minutes that can be located was already provided to the Complainant in response to a previous OPRA request. The Custodian further certifies that the Complainant has filed numerous OPRA requests seeking the June 13, 2000 executive session meeting minutes. The Custodian certifies that on January 2, 2008, the Complainant filed an OPRA request for said meeting minutes. The Custodian also certifies that he advised the Complainant at that time that it appeared that no meeting

⁶ The Custodian attaches a copy of the one (1) page from the executive session meeting minutes that could be located.

occurred on June 13, 2000 because the Custodian was unable to locate any minutes thereof.

The Custodian certifies that the Complainant filed another OPRA request on February 7, 2008 for the executive session meeting minutes at issue herein and that the Custodian advised the Complainant that the Custodian was still attempting to locate these minutes. The Custodian also certifies that the Complainant filed yet another OPRA request on February 19, 2008 for the same minutes and that the Custodian advised the Complainant that the Board was unable to locate these minutes but would continue to search through files in storage in an attempt to locate the minutes. The Custodian further certifies that the Complainant filed another OPRA request on March 25, 2008 for the same minutes and that the Custodian again advised the Complainant that UCBOE was unable to locate the executive session minutes, but if located, said minutes would be provided to the Complainant. The Custodian certifies that the Complainant filed yet another OPRA request on August 4, 2008 seeking the executive session meeting minutes at issue herein, to which the Custodian denied access because UCBOE was unable to locate these minutes.

The Custodian certifies that UCBOE continued to search for the executive session minutes and on May 30, 2008, one (1) page of the executive session minutes was located in a box labeled “Nancy’s copies”; a copy of such record was immediately provided to the Complainant. The Custodian also certifies that he was not aware of the existence or the contents of the box labeled “Nancy’s copies” in which his assistant located one page of the requested executive session minutes.

The Custodian certifies that because the Complainant’s initial requests were made over two (2) years ago, it is impossible to estimate the hours expended searching for the executive session minutes because UCBOE employees do not and are not required to keep a detailed accounting of each hour spent on a particular assignment. The Custodian also certifies that the Complainant is correct that Richard Rivera, (“Mr. Rivera”) filed numerous similar OPRA requests to the Board seeking the same executive session minutes at issue herein. The Custodian further certifies that the Complainant is correct that Mr. Rivera’s request was the subject of a GRC Complaint filed by Mr. Rivera.

The Custodian certifies that he refreshed his recollection after reviewing Mr. Rivera’s complaint. The Custodian certifies that Ms. Eva Festa (“Ms. Festa”), Confidential Secretary, first searched through UCBOE’s ledger minute book and could not locate the requested minutes. The Custodian also certifies that Ms. Festa searched through six (6) archived boxes at UCBOE and could not locate said minutes. The Custodian states that Ms. Festa located one (1) page from the requested executive session minutes in a box in storage labeled “Nancy’s copies” and a copy of such record was immediately provided to the Complainant on May 30, 2008. The Custodian further certifies that Ms. Festa continued to search for the requested executive session minutes but never located the complete record. Lastly, the Custodian certifies that because the executive session in question predates his tenure as Board Secretary, he does not know and has no way of confirming whether any additional pages, other than the one already provided, even exist.

The Custodian argues that a reasonable search was conducted for the requested executive session minutes in UBCOE's ledger minute book and six (6) archived boxes of records. The Custodian also argues that the UCBOE did not unlawfully deny access to said minutes and has borne its burden of proving due diligence in searching for said minutes pursuant to N.J.S.A. 47:1A-6. The Custodian further argues that the UCBOE cannot be deemed to have violated OPRA when it provided the only copy of a portion of the requested record that it can locate or because it is unable to produce a record that is not in its possession. See N.J.S.A. 47:1A-6; Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005); O'Shea and Paff v. Borough of Emerson, 2008 WL 2328239 (Law. Div. 2008); Paff v. New Jersey Department of Labor, 392 N.J. Super. 333, 341 (App. Div. 2008); Paff v. New Jersey Department of Labor, 392 N.J. Super. 333, 341 (App. Div. 2007); Bent v. Township of Strafford Police Dept., 381 N.J. Super. 30, 39 (App. Div. 2005).

Analysis

Whether the Custodian unlawfully denied access to the record requested?

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 ..." (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 that "...[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.

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.

Further, OPRA 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* ...” (Emphasis added.) N.J.S.A. 47:1A-5.i.

The evidence of record indicates that the Custodian responded to the Complainant’s OPRA request within the statutorily mandated seven (7) business days denying access to the requested record because a copy of the only page of the requested executive session minutes that could be located was already provided to the Complainant in response to a prior OPRA request on May 30, 2008.

In Caggiano v. Borough of Stanhope (Sussex), GRC Complaint No. 2005-211 (January 2006), the complainant filed numerous OPRA requests for the same records in each request. The custodian responded to the complainant stating that the records were previously provided to the complainant in 2002 and 2003 on repeated occasions. The Council held that “the fact that the records were previously provided to the Complainant on several occasions is not a lawful basis to deny access to the records requests.”

In Bart v. City of Paterson Housing Authority, 403 N.J. Super. 609 (App. Div. 2008), the Appellate Division held that a complainant could not have been denied access to a requested record if he already had in his possession at the time of the OPRA request the document he sought pursuant to OPRA. *Id.* at 617. The Appellate Division noted that requiring a custodian to duplicate another copy of the requested record and send it to the complainant does not advance the purpose of OPRA, which is to ensure an informed citizenry. *Id.* (citations omitted). More specifically Bart states:

“It is undisputed that Bart at all times had within his possession a copy of the cover letter at issue...he attached a copy to the complaint he filed with the Council. He could not have been denied access to the document, however, if he already had the document he sought. Bent v. Twp. of Stafford Police Dept., 381 N.J. Super. 30, 34, 38 (App.Div.2005). Requiring the Authority to duplicate another copy and send it to Bart does not...advance the purpose of OPRA, which is to ensure an informed citizenry. Times of Trenton Publ'g Corp. v. Lafayette Yard Cmty. Dev. Corp., 183 N.J. 519, at 535 (2005).”

The facts in the instant matter are distinguishable from Bart, *supra*. In Bart, the complainant had in his possession, the record he was seeking the time of his OPRA request. Furthermore the complainant included a copy of the record along with his Denial of Access Complaint. However, in this instant complaint, although the Complainant included a copy of the executive session minutes with his Denial of Access Complaint, the Complainant argued that he was looking for a more complete version of the records. Thus, he did not have the complete executive session meeting minutes at the time of his request or his Denial of Access complaint. Furthermore, the Custodian responded to the Complainant's OPRA request stating that the only page of these executive session minutes that can be located was already provided to the Complainant on May 30, 2008. Thus, pursuant to Caggiano, *supra*, the Custodian's response is not a lawful basis for a denial of access.

Therefore, because the Custodian's response to the Complainant's OPRA request failed to specify a lawful basis for a denial to the records sought in the OPRA request at issue herein but merely stated that the only page of responsive record that could be located had already been provided to the Complainant, the Custodian's response to the Complainant's request was insufficient pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Caggiano v. Borough of Stanhope (Sussex), GRC Complaint No. 2005-211 (January 2006).

However, the parties agree that one page of the requested executive session minutes was previously provided to the Complainant in response to a prior OPRA request; the evidence of record shows that the Complainant attached to his Denial of Access Complaint a copy of the page of the requested executive session minutes which the Custodian previously provided to him.

Both parties refer to Rivera v. Union City Board of Education (Hudson), GRC Complaint No. 2008-112 (August 2009). In that complaint, the Council addressed the issue of the Custodian's inability to locate the executive session minutes dated June 13, 2000 which are the subject of the instant complaint. In Rivera, the Custodian certified that he responded to the complainant informing him that the requested meeting minutes could not be located, but would be provided if found. The Custodian also certified that Ms. Festa searched through six (6) storage boxes and located one (1) page of the executive session minutes in a box labeled "Nancy's copies" and was immediately provided to the complainant. The Custodian further certified that he was unaware of the existence or the contents of the box labeled "Nancy's copies." The Council determined that

"[b]ecause the Custodian conducted a reasonable search for the requested special meeting minutes in the Board of Education's ledger minute book and six (6) archived boxes of records, and because the Custodian certified that he was not aware of the existence or the contents of the box labeled "Nancy's copies" in which the Custodian's assistant located portions of the requested minutes, the Custodian did not unlawfully deny access to said minutes and has borne his burden of proving his due diligence in searching for said records pursuant to N.J.S.A. 47:1A-6." *Id.*

As in Rivera, the Custodian herein certified in the SOI that after a diligent search of the records in the BOE's possession, one page of the minutes responsive to the instant request were found and provided to the Complainant in response to a previous OPRA request. The Custodian also certified in the SOI that because the requested executive session minutes predate his tenure as Board Secretary, he does not know and has no way of confirming whether the additional pages, other than the one already provided, even exist. The Custodian further certified that the remainder of the requested executive session minutes could not be located after an extensive search for such records. The Complainant has submitted no competent, credible evidence to refute the Custodian's certification.

In Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005), the complainant sought telephone billing records showing a call made to him from the New Jersey Department of Education. The Custodian responded stating that there was no record of any telephone calls made to the Complainant. The Custodian subsequently certified that no records responsive to the Complainant's request existed. The Complainant failed to submit any evidence to refute the Custodian's certification. The GRC held that the Custodian did not unlawfully deny access to the requested records because the Custodian certified that no records responsive to the request existed.

Therefore, because the Custodian herein certified in the SOI that the executive session minutes could not be located and because the Complainant submitted no competent, credible evidence to refute the Custodian's certification, the Custodian has borne his burden of proving that he did not unlawfully deny access to all but the one page of the requested executive session minutes dated June 13, 2000 that could be located pursuant to N.J.S.A. 47:1A-6, Rivera v. Union City Board of Education (Hudson), GRC Complaint No. 2008-112 (August 2009) and Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).

The Council notes that the Complainant asserted that the requested executive session minutes were illegally destroyed and stated that someone must be held accountable if the requested minutes cannot be located. However, the Complainant submitted no competent, credible evidence that the requested executive session minutes were illegally destroyed or otherwise unlawfully disposed of; moreover, pursuant to N.J.S.A. 47:1A-7.b., which delineates the GRC's powers and duties, the Council does not have the authority to regulate the manner in which an agency maintains its files or which records an agency must maintain. See Kwanzaa v. Dept of Corrections, GRC Complaint No. 2004-167 (March 2005)(the GRC does not have authority over the content of a record); Gillespie v. Newark Public Schools, GRC Complaint No. 2004-105 (November 2004)(the GRC does not have the authority to adjudicate the validity of a record); Katinsky v. River Vale Township, GRC Complaint No. 2003-68 (November 2003)(the integrity of a requested record is not within the GRC's authority to adjudicate); Toscano v. NJ Dept of Labor, GRC Complaint No. 2005-59 (September 2005)(the GRC does not have authority over the condition of records provided by a Custodian); Van Pelt v. Edison Township Board of Education, GRC Complaint No. 2007-179 (January 2008)(the GRC

does not have authority over which records a government agency must maintain); Toscano v. NJ Department of Labor, Division of Vocational Rehabilitation Services, GRC Complaint No. 2007-296 (March 2008), (GRC does not have the authority to determine whether an agency correctly followed their records retention policy.)

Whether the Custodian’s insufficient response to the Complainant’s request 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.

The evidence of record indicates that the Complainant filed his OPRA request on August 2, 2010. The evidence of record further indicates that the Custodian timely responded to the Complainant’s OPRA request denying access to the requested records and stating that the only page of these executive session minutes that could be located was previously provided to the Complainant. Furthermore, the Custodian certified in the SOI that the requested executive session minutes could not be located after an extensive search for such records.

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).

The Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. by providing an insufficient response to the Complainant's OPRA request because the Custodian did not provide a lawful basis for the denial of access to the requested records. However, the Custodian certified in the SOI that the requested executive session minutes could not be located after an extensive search. 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 an 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's response to the Complainant's OPRA request failed to specify a lawful basis for a denial to the records sought in the OPRA request at issue herein but merely stated that the only page of responsive record that could be located had already been provided to the Complainant, the Custodian's response to the Complainant's request was insufficient pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Caggiano v. Borough of Stanhope (Sussex), GRC Complaint No. 2005-211 (January 2006).
2. Because the Custodian herein certified in the Statement of Information that the executive session minutes could not be located and because the Complainant submitted no competent, credible evidence to refute the Custodian's certification, the Custodian has borne his burden of proving that he did not unlawfully deny access to the requested executive session minutes dated June 13, 2000 pursuant to N.J.S.A. 47:1A-6, Rivera v. Union City Board of Education (Hudson), GRC Complaint No. 2008-112 (August 2009) and Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).
3. The Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. by providing an insufficient response to the Complainant's OPRA request because the Custodian did not provide a lawful basis for the denial of access to the requested records. However, the Custodian certified in the SOI that the requested executive session minutes could not be located after an extensive search. 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 an unreasonable denial of access under the totality of the circumstances.

Prepared By: Harlynn A. Lack, Esq.
Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

March 20, 2012