



**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**  
*Commissioner*

**FINAL DECISION**

**June 26, 2012 Government Records Council Meeting**

Sabino Valdes  
Complainant

Complaint No. 2010-285

v.

Union City Board of Education (Hudson)  
Custodian of Record

At the June 26, 2012 public meeting, the Government Records Council (“Council”) considered the June 19, 2012 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the amended findings and recommendations. The Council, therefore, finds that:

1. Because the Custodian disclosed to the Complainant all records ordered for disclosure pursuant to the Council’s May 29, 2012 Interim Order, and provided certified confirmation of compliance to the Executive Director within the time period provided for compliance with said Order, and further provided a detailed document index explaining the lawful basis for each redaction made to the September 19, 2000 executive session meeting minutes, the Custodian fully complied with the Council’s May 29, 2012 Interim Order.
2. Although the Custodian failed to specify a lawful basis for denial to the records sought in the Complainant’s request, the Custodian did fully comply in a timely manner with the Council’s May 29, 2012 Interim Order by disclosing the records responsive to request item numbers 1 and 2. Moreover, the evidence of record does not indicate that the Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

This is the final administrative determination in this matter. Any further review should be pursued in the Appellate Division of the Superior Court of New Jersey within forty-five (45) days. Information about the appeals process can be obtained from the Appellate Division Clerk’s Office, Hughes Justice Complex, 25 W. Market St., PO Box 006, Trenton, NJ 08625-0006. Proper service of submissions pursuant to any appeal is to be made to the Council in care of the Executive Director at the State of New Jersey Government Records Council, 101 South Broad Street, PO Box 819, Trenton, NJ 08625-0819.



Final Decision Rendered by the  
Government Records Council  
On The 26<sup>th</sup> Day of June, 2012

Steven F. Ritardi, Esq., Acting Chair  
Government Records Council

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

Denise Parkinson Vetti, Secretary  
Government Records Council

**Decision Distribution Date: June 27, 2012**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director  
June 26, 2012 Council Meeting**

**Sabino Valdes<sup>1</sup>  
Complainant**

**GRC Complaint No. 2010-285**

v.

**Union City Board of Education (Hudson)<sup>2</sup>  
Custodian of Records**

**Record Relevant to Complaint:**

1. Meeting minutes from a special meeting of the Union City Board of Education on September 13, 2000.
2. Executive session minutes from a meeting of the Union City Board of Education on September 19, 2000.

**Requests Made:** October 4, 2010 and October 5, 2010<sup>3</sup>

**Response Made:** October 27, 2010

**Custodian:** Anthony Dragona

**GRC Complaint Filed:** November 1, 2010<sup>4</sup>

**Background**

**May 29, 2012**

At the May 29, 2012 public meeting, the Government Records Council (“Council”) considered the May 22, 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, found that:

1. Because the Custodian’s response to the Complainant’s OPRA request for item number 1 failed to specify a lawful basis for a denial to the record sought in the OPRA request and instead stated that the requested record was denied because it 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).

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

<sup>2</sup> Represented by Susanne Lavelle, Esq., (Union City, NJ).

<sup>3</sup> Although the OPRA requests were prepared on two different dates, the Complainant and the Custodian are in agreement that both requests were provided to the Custodian on October 5, 2010.

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

2. Because the Custodian's response to the Complainant's OPRA request for item number 2 failed to specify a lawful basis for a denial to the record, 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 N.J.S.A. 47:1A-6.
3. Because the Custodian failed to provide a lawful reason for denying the Complainant access to the requested records, the Custodian shall disclose to the Complainant the records responsive to the Complainant's request for request item number 1 and request item number 2.
4. **The Custodian shall comply with paragraph #3 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director.**
5. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

#### **May 30, 2012**

Council's Interim Order ("Order") distributed to the parties.

#### **June 1, 2012**

Letter from the Custodian's Counsel to the GRC. The Custodian's Counsel forwards to the GRC the Custodian's certification dated May 31, 2012. The Custodian certifies that pursuant to the terms of the Order, he disclosed to the Complainant the records responsive to request item numbers 1 and 2, which are meeting minutes from a special meeting of the Union City Board of Education ("Board") on September 13, 2000 and redacted executive session minutes from a meeting of the Board on September 19, 2000, respectively. The Custodian's Counsel also forwarded a detailed document index explaining the lawful basis for each redaction made to the September 19, 2000 executive session meeting minutes.

#### **June 7, 2012**

Letter from the Complainant to the GRC. The Complainant states that because the GRC presented his complaint to the Council without all of the necessary documentation, and because the Custodian provided the Council with misleading information, the Complainant has attached an Amended Denial of Access Complaint for consideration by the Council.

#### **June 8, 2012**

The GRC returns the Amended Denial of Access Complaint to the Complainant unread and informs the Complainant that he missed the deadline for filing an Amended Denial of Access Complaint by approximately eighteen (18) months.

**June 13, 2012**

Letter from the Complainant to the Executive Director of the GRC. The Complainant informs the Executive Director that his Amended Denial of Access Complaint dated June 7, 2012 was rejected by the GRC because it was submitted to the GRC eighteen (18) months beyond the deadline date. The Complainant states that his Amended Denial of Access Complaint should have been accepted by the GRC because it took the GRC a long time to present his complaint to the Council, the Council's May 29, 2012 Interim Order failed to provide him with an opportunity to respond to the Custodian's certification, and the GRC should accept from the Complainant additional information deemed necessary for the Council to adjudicate a complaint.

**June 14, 2012**

Letter from the Complainant to the Commissioner of the New Jersey Department of Community Affairs. The Complainant tells the Commissioner that the GRC has resorted to submitting his complaints to the Council without obtaining the necessary information from the parties in order to properly adjudicate such complaints. The Complainant further tells the Commissioner that the GRC has designed such a scheme in order to bar any response from the Complainant to the misleading information submitted by the Custodian.

**June 18, 2012**

Complainant's Amended Denial of Access Complaint. The Complainant forwards to the GRC via Federal Express his Amended Denial of Access Complaint dated June 7, 2012. The Complainant's submission is not an amendment to the Denial of Access Complaint; it is in the nature of a responsive submission to the Custodian's certification in compliance with the Council's Interim Order dated May 29, 2012. The gravamen of the Complainant's argument is that the special meeting minutes dated September 13, 2000 was not disclosed to him in compliance with the Council's Interim Order dated May 29, 2012 because the minutes are unsigned. The Complainant argues that because the minutes are not signed they are a draft. The Complainant states that he knows signed minutes exist and he wants the Custodian to disclose the signed minutes to him. In the alternative, the Complainant wants the Custodian to disclose to him an exemplified copy of said minutes.

**June 18, 2012**

Telephone call from the GRC to the Custodian's Council. The GRC informs the Custodian's Counsel that the GRC reviewed the Complainant's Amended Denial of Access Complaint and learned that the submission did not contain an amendment to the Complainant's Denial of Access Complaint but rather was a responsive submission to the Custodian's certification dated May 31, 2012. The GRC asks Counsel to have the Custodian forward a certification averring whether the unsigned September 13, 2000 special meeting minutes which were disclosed to the Complainant in compliance with the Council's Interim Order dated May 29, 2012 is the only such record responsive to the Complainant's request or whether a copy signed by Board Secretary Carl Johnson exists. The GRC further tells Counsel to have the Custodian disclose a signed copy of the record, if such a copy exists.

### **June 19, 2012**

Letter from the GRC to the Custodian's Counsel. The GRC sends a letter to the Custodian's Council confirming the June 18, 2012 telephone conversation between Counsel and the GRC.

### **June 21, 2012**

Custodian's certification. The Custodian certifies that in compliance with the Council's Interim Order dated May 29, 2012 the Custodian disclosed to the Complainant a copy of the special meeting minutes dated September 13, 2000, a redacted copy of the executive session minutes dated September 19, 2000, a document index for each record, and the Custodian's certification. The Custodian further certifies that the copy of the September 13, 2000 special meeting minutes unsigned by Board Secretary Carl Johnson which was disclosed to the Complainant is (a) a copy of the exact meeting minutes that are kept in the ledger books, (b) the only such minutes in the Board's possession, (c) the only document responsive to the Complainant's request for said minutes, (d) no other copy of said minutes exist and therefore no other copy can be disclosed to the Complainant. The Custodian certifies that the Complainant has in the past requested that said minutes be certified by the Custodian. The Custodian certifies that on the advice of Counsel he has declined to certify the minutes because he was not the Board Secretary at the time the minutes were created and OPRA does not require a Custodian to create a record in response to an OPRA request.

### **June 22, 2012**

Letter from the Complainant to the GRC. The Complainant informs the GRC that he is in receipt of the GRC's letter to the Custodian dated June 19, 2012 and the Custodian's certification dated June 21, 2012. The Complainant again argues that the Custodian failed to disclose the requested record, but instead disclosed a "draft" of the requested record.

The Complainant's argument is as follows: because the special meeting minutes dated September 13, 2000 is not signed by the Board Secretary it is a "draft," because it is a "draft" it is advisory, consultative and deliberative ("ACD") material under OPRA which is excluded from the definition of a government record; therefore, by disclosing the unsigned minutes the Custodian disclosed ACD material and not the requested record.<sup>5</sup> The Complainant then asserts that because the Custodian certified in his May 31, 2012 certification that he disclosed the requested record, he purposely misled the Council and willfully violated OPRA.

## **Analysis**

### **Whether the Custodian complied with the Council's May 29, 2012 Interim Order?**

At its May 29, 2012 public meeting, the Council determined that the Custodian shall disclose the records responsive to request item number 1 and request item number 2 of the Complainant's OPRA request within five (5) business days from receipt of the

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<sup>5</sup> The Complainant is making reference to N.J.S.A. 47:1A-1.1., which defines a government record but excludes from that definition "inter-agency or intra-agency advisory, consultative, or deliberative material." Sabino Valdes v. Union City Board of Education (Hudson), 2010-285 – Supplemental Findings and Recommendations of the Executive Director 4

Council's Interim Order with appropriate redactions as necessary, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director.

On June 1, 2012, one (1) day following receipt of the Council's Order, the Custodian certified that he provided the following records to the Complainant:

- Request item number 1, meeting minutes from a special meeting of the Board on September 13, 2000
- Request item number 2, redacted executive session minutes from a meeting of the Board on September 19, 2000

The Custodian also included a detailed document index explaining the lawful basis for each redaction made to the September 19, 2000 executive session meeting minutes. The redactions were made to exempt from disclosure attorney advice, attorney-client discussions and advisory, consultative or deliberative material pursuant to N.J.S.A. 47:1A-1.1.

After receiving the records from the Custodian, the Complainant objected via submission of an Amended Denial of Access Complaint because the disclosed special meeting minutes dated September 13, 2000 was unsigned by the Board Secretary. The Complainant argued that because the record is not signed by the Board Secretary it is a "draft," because it is a "draft" it is advisory, consultative and deliberative ("ACD") material under OPRA which is excluded from the definition of a government record; therefore, by disclosing the unsigned minutes the Custodian disclosed ACD material and not the requested record. The Complainant further asserts that because the Custodian certified in his May 31, 2012 certification that he disclosed the requested record, he purposely mislead the Council and willfully violated OPRA.

The Complainant's syllogism is faulty. Because a record may be incomplete in some way, it does not necessarily follow that the record is a draft. Moreover, even if the record is a draft and may be considered ACD material, that does not mean it cannot be disclosed; it merely means that the Custodian does not have a legal duty under OPRA to disclose it. Here, the Custodian disclosed to the Complainant a copy of the unsigned special meeting minutes dated September 13, 2000 because that Custodian certified that it was the only record responsive to the Complainant's request for item number 1.

The Complainant also stated that the GRC "[submitted his] complaints to the Council without obtaining the necessary information from the parties [in order to properly adjudicate them]." This is simply not true. The Complainant is attempting to assign blame to the GRC for his incompetent and/or incomplete preparation of the Denial of Access Complaint filed on November 1, 2010. On page 4 of the Denial of Access Complaint the Complainant states that the record or portion of the record to which access had been denied was "[T]rue copy of Minutes from a Special or Regular Meeting held by the Union City Board of Education on September 13, 2000." The Complainant did not mention in his complaint that he wanted or would only accept a signed copy of the minutes. In fact, the Complainant supplemented his complaint with a three (3) page Sabino Valdes v. Union City Board of Education (Hudson), 2010-285 – Supplemental Findings and Recommendations of the Executive Director

narrative, but failed to mention anything within those three (3) pages about wanting or accepting only a signed copy of the record. However, even if the Complainant did request the record in a specific format, the Custodian can only disclose to the Complainant those records, not otherwise exempt from disclosure that the agency maintains or keeps on file in the course of its official business. The Custodian cannot disclose a record that does not exist.

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 and the complainant did not provide any evidence to refute the custodian's certification. The GRC determined that although the custodian failed to respond to the OPRA request in a timely manner, the custodian did not unlawfully deny access to the requested records because the custodian certified that no records responsive to the request existed.

Here, the Custodian certified that no records other than the records he disclosed in compliance with the Council's May 29, 2012 Interim Order exist and the Complainant offered no credible evidence to refute the Custodian's certification. As such, the unsigned copy of the special meeting minutes dated September 13, 2000, that the Custodian disclosed satisfy the provisions of the Council's Order.

Although the Complainant requested a true copy of the records, there is no provision within OPRA that requires custodians to disclose true copies of records. And although the Complainant argued in the alternative that he wanted the Custodian to disclose to him an exemplified copy of the record, there is no provision within OPRA that requires the custodians to create a record, for example by certifying to the authenticity of a specific record. To the contrary, the Superior Court has determined that "...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). OPRA does not require custodians to research files to discern which records may be responsive to a request or compile records which do not otherwise exist. *Id.* at 546.

Therefore, because the Custodian disclosed to the Complainant all records ordered for disclosure pursuant to the Council's May 29, 2012 Interim Order, and provided certified confirmation of compliance to the Executive Director within the time period provided for compliance with said Order, and further provided a detailed document index explaining the lawful basis for each redaction made to the September 19, 2000 executive session meeting minutes, the Custodian fully complied with the Council's May 29, 2012 Interim Order.

**Whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the circumstances?**



OPRA states that:

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

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

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

Certain legal standards must be considered when making the determination of whether the Custodian’s actions rise to the level of a “knowing and willful” violation of OPRA. The following statements must be true for a determination that the Custodian “knowingly and willfully” violated OPRA: the Custodian’s actions must have been much more than negligent conduct (Alston v. City of Camden, 168 N.J. 170, 185 (2001); the Custodian must have had some knowledge that his actions were wrongful (Fielder v. Stonack, 141 N.J. 101, 124 (1995)); the Custodian’s actions must have had a positive element of conscious wrongdoing (Berg v. Reaction Motors Div., 37 N.J. 396, 414 (1962)); the Custodian’s actions must have been forbidden with actual, not imputed, knowledge that the actions were forbidden (Berg); the Custodian’s actions must have been intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional (ECES v. Salmon, 295 N.J.Super. 86, 107 (App. Div. 1996).

In the matter before the Council, although the Custodian failed to specify a lawful basis for denial to the records sought in the Complainant’s request, the Custodian did fully comply in a timely manner with the Council’s May 29, 2012 Interim Order by disclosing the records responsive to request item numbers 1 and 2. Moreover, the evidence of record does not indicate that the Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. Because the Custodian disclosed to the Complainant all records ordered for disclosure pursuant to the Council’s May 29, 2012 Interim Order, and provided certified confirmation of compliance to the Executive Director

within the time period provided for compliance with said Order, and further provided a detailed document index explaining the lawful basis for each redaction made to the September 19, 2000 executive session meeting minutes, the Custodian fully complied with the Council's May 29, 2012 Interim Order.

2. Although the Custodian failed to specify a lawful basis for denial to the records sought in the Complainant's request, the Custodian did fully comply in a timely manner with the Council's May 29, 2012 Interim Order by disclosing the records responsive to request item numbers 1 and 2. Moreover, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Prepared By: John E. Stewart, Esq.

Approved By: Karyn Gordon, Esq.  
Acting Executive Director

June 19, 2012



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

INTERIM ORDER

May 29, 2012 Government Records Council Meeting

Sabino Valdes  
Complainant

Complaint No. 2010-285

v.

Union City Board of Education (Hudson)  
Custodian of Record

At the May 29, 2012 public meeting, the Government Records Council ("Council") considered the May 22, 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 for item number 1 failed to specify a lawful basis for a denial to the record sought in the OPRA request and instead stated that the requested record was denied because it 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's response to the Complainant's OPRA request for item number 2 failed to specify a lawful basis for a denial to the record, 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 N.J.S.A. 47:1A-6.
3. Because the Custodian failed to provide a lawful reason for denying the Complainant access to the requested records, the Custodian shall disclose to the Complainant the records responsive to the Complainant's request for request item number 1 and request item number 2.
4. **The Custodian shall comply with paragraph #3 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4<sup>1</sup>, to the Executive Director.<sup>2</sup>**

<sup>1</sup> "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

<sup>2</sup> Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the

5. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Interim Order Rendered by the  
Government Records Council  
On The 29<sup>th</sup> Day of May, 2012

Robin Berg Tabakin, Chair  
Government Records Council

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

Denise Parkinson Vetti, Secretary  
Government Records Council

**Decision Distribution Date: May 30, 2012**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
May 29, 2012 Council Meeting**

**Sabino Valdes<sup>1</sup>  
Complainant**

**GRC Complaint No. 2010-285**

v.

**Union City Board of Education (Hudson)<sup>2</sup>  
Custodian of Records**

**Record Relevant to Complaint:**

1. Meeting minutes from a special meeting of the Union City Board of Education on September 13, 2000.
2. Executive session minutes from a meeting of the Union City Board of Education on September 19, 2000.

**Requests Made:** October 4, 2010 and October 5, 2010<sup>3</sup>

**Response Made:** October 27, 2010

**Custodian:** Anthony Dragona

**GRC Complaint Filed:** November 1, 2010<sup>4</sup>

**Background**

**October 4, 2010**

Complainant's Open Public Records Act ("OPRA") request. The Complainant requests the records relevant to this complaint listed above as request item number 1 on an official OPRA request form.

**October 5, 2010**

Complainant's Open Public Records Act ("OPRA") request. The Complainant requests the records relevant to this complaint listed above as request item number 2 on an official OPRA request form.

**October 5, 2010**

Custodian's response to the OPRA requests. The Custodian responds in writing to the Complainant's OPRA requests on the date of receipt of such requests.<sup>5</sup> The

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

<sup>2</sup> Represented by Susanne Lavelle, Esq., (Union City, NJ); however, there are no submissions from the Custodian's Counsel to the GRC on file.

<sup>3</sup> Although the OPRA requests were prepared on two different dates, the Complainant and the Custodian are in agreement that both requests were provided to the Custodian on October 5, 2010.

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

<sup>5</sup> The Custodian certifies in the SOI that he received all the Complainant's OPRA requests on October 5, 2010.

Custodian states that because the Complainant submitted twenty (20) OPRA requests during the past week, the Custodian was requesting an extension of time until October 20, 2010 to address the Complainant's requests.

#### **October 18, 2010**

Letter from the Custodian to the Complainant. The Custodian informs the Complainant that the Custodian is still searching for some of the records responsive to the Complainant's requests and will not be able to address the Complainant's requests by October 20, 2010. The Custodian further informs the Complainant that the Custodian will need an additional extension of time to October 29, 2010 in order to address the Complainant's requests.

#### **October 27, 2010**

Letter from the Custodian to the Complainant. The Custodian informs the Complainant that the Complainant previously requested request item number 1 and in response to the Complainant's request, the Custodian disclosed the record to the Complainant on December 21, 2007. The Custodian further informs the Complainant that because the Custodian disclosed request item number 1 to the Complainant on December 21, 2007, this request item is denied.

The Custodian informs the Complainant that on November 15, 2007, the Complainant filed an OPRA request for September 19, 2000 meeting minutes. The Custodian informs the Complainant that the Custodian disclosed the September 19, 2000 meeting minutes to the Complainant on December 21, 2007, and concurrently and erroneously disclosed an unredacted copy of the executive session minutes for the same meeting, which is responsive to request item number 2 herein. The Custodian states that because the Custodian inadvertently disclosed request item number 2 to the Complainant on December 21, 2007, access to this request item is denied.<sup>6</sup>

#### **November 1, 2010**

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

- Copy of Board executive session minutes dated September 13, 2000
- Copy of Board special meeting minutes dated September 19, 2000
- Complainant's OPRA request dated October 4, 2010
- Complainant's OPRA request dated October 5, 2010
- Custodian's response to the OPRA request dated October 27, 2010

The Complainant states that his OPRA requests for the records relevant to this complaint were provided to the Custodian on October 5, 2010. The Complainant further states that the Custodian denied him access to request item number 1 because the Custodian previously disclosed to him the executive session minutes for a special Board meeting on September 13, 2000, but did not disclose to him the regular meeting minutes

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<sup>6</sup> The Custodian's response to the Complainant dated October 27, 2010 stated that the record was disclosed to the Complainant on December 21, 2000. The Custodian corrected the record to reflect the correct date upon which the record was disclosed, December 21, 2007.

as requested. The Complainant directs the GRC's attention to a copy of the executive session minutes for a special Board meeting on September 13, 2000, which the Complainant attached to his complaint. The Complainant also states that the Custodian denied access to request item number 2 because the Custodian previously disclosed to him the regular meeting minutes for a meeting on September 19, 2000, but did not disclose to him the executive session minutes as requested. The Complainant directs the GRC's attention to a copy of the regular meeting minutes for a meeting on September 19, 2000, which the Complainant attached to his complaint.

The Complainant does not agree to mediate this complaint.

**November 24, 2010**

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

**December 1, 2010**

Letter from the Complainant to the Custodian's Counsel. The Complainant states that on November 30, 2010, Counsel asked him to withdraw his complaint. The Complainant states that he cannot withdraw his complaint because the Custodian has failed to disclose to him a copy of the official signed September 13, 2000 Board meeting minutes. The Complainant also states that he received a copy of redacted September 19, 2000 executive session minutes; however, the redactions are unwarranted because a New Jersey Education Association attorney was in attendance.

**December 3, 2010**

Custodian's SOI with the following attachments:

- Copy of Board special meeting minutes dated September 13, 2000
- Copy of redacted Board executive session minutes dated September 19, 2000
- Letter from the Custodian to the Complainant dated December 21, 2007
- Invoice from the Custodian to the Complainant dated January 3, 2008
- Complainant's OPRA request dated October 4, 2010
- Complainant's OPRA request dated October 5, 2010
- Custodian's response to the OPRA requests dated October 5, 2010
- Letter from the Custodian to the Complainant dated October 18, 2010
- Letter from the Custodian to the Complainant dated October 27, 2010
- Letter from the Complainant to Custodian's Counsel dated December 1, 2010

The Custodian certifies that his search for the requested records involved giving the OPRA requests to his assistant who reviews incoming requests against older requests filed by the same requestor. The Custodian certified that he has knowledge that his assistant determined that the records responsive to the Complainant's requests were provided to the Complainant on December 21, 2007 in response to earlier OPRA requests. The Custodian further certifies that he has knowledge that after the assistant located the earlier requests and determined that the Complainant's OPRA requests had already been fulfilled, the assistant forwarded the requests to the Board's legal counsel who concurred with the assistant's findings. The Custodian certifies that once he was informed that the Complainant had previously requested and received the records

responsive to the requests, the Custodian denied the Complainant's request for the same records.

The Custodian also certifies that the records that may have been responsive to the request were not destroyed in accordance with the Records Destruction Schedule established and approved by New Jersey Department of State, Division of Archives and Records Management because the records must be retained permanently.

The Custodian certifies that on December 21, 2007, in response to the Complainant's OPRA request dated December 12, 2007, the Custodian disclosed to the Complainant the record responsive to request item number 1. The Custodian certifies that because he had already disclosed the requested record to the Complainant in response to an earlier OPRA request, he denied the Complainant's request for the records responsive to request item number 1. The Custodian further certifies that at the time he received the Complainant's OPRA request dated October 5, 2010 he thought that he had also disclosed to the Complainant on December 21, 2007 the record responsive to request item number 2; therefore, he denied the Complainant access to the record.<sup>7</sup> The Custodian further certifies that he later realized that he did not disclose to the Complainant the record responsive to request item number 2 until November 23, 2010, in response to the Complainant's OPRA request dated November 10, 2010.<sup>8</sup>

The Custodian asserts that he did not violate OPRA by denying the Complainant's requests for records that he had previously disclosed to the Complainant.

### Analysis

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

OPRA provides that:

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

Additionally, OPRA defines a government record as:

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<sup>7</sup> The Custodian certified that, in response to an OPRA request submitted by the Complainant on November 27, 2007 for September 19, 2000 regular session minutes, he disclosed to the Complainant the September 19, 2000 regular session minutes and also mistakenly disclosed the September 19, 2000 executive session minutes in unredacted form. The Custodian therefore certified that he denied the Complainant's October 5, 2010 OPRA request for the September 19, 2000 executive session minutes because he had previously disclosed them to the Complainant. After the Complainant filed the instant complaint, the Custodian certified that he realized that he had not previously disclosed the September 19, 2000 executive session minutes to the Complainant.

<sup>8</sup> The Custodian also argues that the Complainant should have withdrawn the instant complaint because the November 19, 2000 executive session minutes which were disclosed to the Complainant in redacted form on November 23, 2010 in response to his November 10, 2010 OPRA request (and which is the same record as request item number 2 of this complaint) were properly redacted. However, this argument is not relevant to the instant complaint and therefore is not included herein.



“... 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 also 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 further 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.

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.

Here, there is no dispute between the parties that the Complainant filed his OPRA requests on October 5, 2010 and that the Custodian received the Complainant’s requests on October 5, 2010. There is also no dispute between the parties that the Custodian responded to the Complainant’s OPRA requests in a timely manner, as extended.

With respect to request item number 1, the Custodian certified that he received an OPRA request from the Complainant on December 12, 2007 seeking minutes for a special meeting of the Board held on September 13, 2000. The Custodian certified that on December 21, 2007, he disclosed the requested record to the Complainant. The Custodian asserted that because the record disclosed on December 21, 2007 is identical to

the record responsive to request item number 1, the record responsive to request item number 1 was properly denied.

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.”

Subsequently, 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.*

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).”

However, the Appellate Division’s decision in Bart, *supra*, turns upon the specific facts of that case. The facts in the instant complaint are distinguishable from Bart because in Bart, the complainant had in his possession the record he was seeking at the time of his OPRA request. Furthermore the complainant included a copy of the record along with his Denial of Access Complaint. Here, the Custodian had no reason to believe the Complainant was in possession of the record responsive to request item number 1. In fact, almost three (3) years had passed since the Custodian disclosed to the Complainant the record identical to request item number 1. Thus, pursuant to Caggiano, *supra*, the Custodian’s response is not a lawful basis for a denial of access.

Accordingly, because the Custodian’s response to the Complainant’s OPRA request for item number 1 failed to specify a lawful basis for a denial to the record sought in the OPRA request and instead stated that the requested record was denied because it had already been provided to the Complainant some three (3) years earlier, 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).

With respect to request item number 2, the Custodian certified that he denied the Complainant's request for that record because he thought that he had disclosed it to the Complainant on December 21, 2007; however, after the Custodian received the instant complaint he realized that he did not disclose the record responsive to request item number 2. The Custodian further certified that during the pendency of the instant complaint, he received an OPRA request from the Complainant dated November 10, 2010 seeking the same record as the record responsive to request item number 2. The Custodian certified that he responded to the Complainant's November 10, 2010 request on November 23, 2010 by disclosing a redacted copy of the record. The Custodian certified that since the redacted copy of the record responsive to the Complainant's November 10, 2010 request was identical to the record responsive to request item number 2, the record responsive to request item number 2 was properly denied.<sup>9</sup>

Although the Custodian certified that he disclosed to the Complainant a record identical to request item number 2 in response to the Complainant's November 10, 2010 OPRA request and that this was the reason for denying the Complainant access to the record, the denial of the Complainant's November 10, 2010 OPRA request was not a basis for the instant complaint. As such, it is not necessary to analyze whether or not the record was lawfully denied for that reason.

The Custodian denied the Complainant access to request item number 2 because he certified that he mistakenly believed that he had previously disclosed the record to the Complainant on December 21, 2007, when in fact he discovered he had not. OPRA places the burden on the Custodian to prove that a denial of access to records is lawful pursuant to N.J.S.A. 47:1A-6. and because the Custodian acted under the mistaken belief that the record was lawfully denied, the Custodian failed to meet that burden.

Therefore, because the Custodian's response to the Complainant's OPRA request for item number 2 failed to specify a lawful basis for a denial to the record, 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 N.J.S.A. 47:1A-6.

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<sup>9</sup> In the instant complaint, the Custodian denied request item number 2 because he thought he had disclosed it to the Complainant several years ago and therefore was under no obligation to do so again. While preparing the SOI for the instant complaint, the Custodian realized that he had not previously disclosed request item number 2 to the Complainant. Apparently, the Custodian was going to disclose request item number 2 in response to the Complainant's October 5, 2010 OPRA request (which was one of the requests which gave rise to the instant complaint); however, before he did so, the Complainant submitted another OPRA request on November 10, 2010 for a record identical to request item number 2. The Complainant submitted such OPRA request *nine (9) days after he filed the instant complaint*. Thereafter, in response to the Complainant's November 10, 2010 OPRA request, the Custodian disclosed a record identical to request item number 2. The Custodian disclosed this record on November 23, 2010, which was ten (10) days before he submitted the SOI in the instant complaint. The Custodian then certified in the SOI for the instant complaint that he disclosed request item number 2 to the Complainant on November 23, 2010 and he relied on such disclosure as the legal reason for denying the Complainant access to that record in the instant complaint. This was an error because the Complainant's November 10, 2010 OPRA request, which prompted the Custodian's November 23, 2010 disclosure of the record identical to request item number 2, was not a request which formed the basis of the instant complaint.

Because the Custodian failed to provide a lawful reason for denying the Complainant access to the requested records, the Custodian shall disclose to the Complainant the records responsive to the Complainant's request for request item number 1 and request item number 2.

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

The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

**Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. Because the Custodian's response to the Complainant's OPRA request for item number 1 failed to specify a lawful basis for a denial to the record sought in the OPRA request and instead stated that the requested record was denied because it 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's response to the Complainant's OPRA request for item number 2 failed to specify a lawful basis for a denial to the record, 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 N.J.S.A. 47:1A-6.
3. Because the Custodian failed to provide a lawful reason for denying the Complainant access to the requested records, the Custodian shall disclose to the Complainant the records responsive to the Complainant's request for request item number 1 and request item number 2.
4. **The Custodian shall comply with paragraph #3 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4<sup>10</sup>, to the Executive Director.<sup>11</sup>**

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<sup>10</sup> "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

<sup>11</sup> Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

5. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Prepared By: John E. Stewart, Esq.

Approved By: Catherine Starghill, Esq.  
Executive Director

May 22, 2012