



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

April 25, 2012 Government Records Council Meeting

Sabino Valdes  
Complainant

Complaint No. 2010-329

v.

Union City Board of Education (Hudson)  
Custodian of Record

At the April 25, 2012 public meeting, the Government Records Council (“Council”) considered the April 18, 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 for the executive session minutes sought in the OPRA request dated November 29, 2010, but merely stated that the only page said executive session minutes 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 Council takes judicial notice of Valdes v. Union City Board of Education (Hudson), GRC Complaint No. 2010-218 (March 2010), in which the Council held that the Custodian could not locate the executive session minutes responsive to the Complainant’s OPRA request and the Complainant again requested the same executive session minutes, the Custodian has borne his burden of proving that he did not unlawfully deny access to the executive session minutes dated June 13, 2000 requested in the matter herein. N.J.S.A. 47:1A-6. See 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. Because the Custodian certified in his Statement of Information that the Certificate of Determination was never signed because UCBOE did not determine whether there was probable cause for the Complainant’s tenure charges, an unsigned copy of the draft Certificate of Determination relevant to the tenure charges filed upon the Complainant on April 27, 2000 is considered advisory, consultative and deliberative material and is therefore exempt from disclosure under OPRA pursuant to N.J.S.A. 47:1A-1.1 and In Re Liquidation of Integrity Insurance Co., 165 N.J. 75 (2000).



4. Because the Custodian certified in the Statement of Information that a signed copy of the Certificate of Determination relevant to the tenure charges filed upon the Complainant on April 27, 2000 does not exist and because there is no evidence in the record to refute the Custodian's certification, the Custodian has not unlawfully denied the Complainant access to the requested records pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005). N.J.S.A. 47:1A-6.
5. 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 dated November 29, 2010 because the Custodian did not provide a lawful basis for the denial of access to the requested records. However, the Council takes judicial notice of Valdes v. Union City Board of Education (Hudson), GRC Complaint No. 2010-218, in which the Council decided that a more complete copy of the UCBOE executive session minutes dated June 13, 2000 does not exist, an unsigned copy of the draft Certificate of Determination relevant to the tenure charges filed upon the Complainant on April 27, 2000 is considered advisory, consultative and deliberative material and is therefore exempt from disclosure under OPRA pursuant to N.J.S.A. 47:1A-1.1, and no records exist which are responsive to the Complainant's request for a signed copy of the Certificate of Determination relevant to the tenure charges filed upon the Complainant on April 27, 2000. 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 25<sup>th</sup> Day of April, 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: April 30, 2012**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
April 25, 2012 Council Meeting**

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

**GRC Complaint No. 2010-329**

v.

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

**Records Relevant to Complaint:** Copies of the following:

November 29, 2010: Unredacted copy of the Union City Board of Education (“UCBOE”) executive session minutes held on June 13, 2000.

November 30, 2010: Signed or unsigned copy of the draft Certificate of Determination by the Law Firm of Murray, Murray and Corrigan relevant to the tenure charges filed against the Complainant on April 27, 2000.

**Request Made:** November 29, 2010 & November 30, 2010

**Response Made:** December 8, 2010

**Custodian:** Anthony Dragona

**GRC Complaint Filed:** December 14, 2010<sup>3</sup>

**Background**

**November 29, 2010**

Complainant’s first (1<sup>st</sup>) Open Public Records Act (“OPRA”) request. The Complainant requests the records relevant to this complaint listed above on an official OPRA request form.

**November 30, 2010**

Complainant’s second (2<sup>nd</sup>) OPRA request. The Complainant requests the records relevant to this complaint listed above on an official OPRA request form.

**December 8, 2010**

Custodian’s response to the first (1<sup>st</sup>) and second (2<sup>nd</sup>) OPRA requests. The Custodian responds in writing on the seventh (7<sup>th</sup>) and sixth (6<sup>th</sup>) business day, respectively, following receipt of such requests. The Custodian states that access to the executive session meeting minutes responsive to the first (1<sup>st</sup>) OPRA request is denied

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

because the Custodian provided a copy of the executive session minutes to the Complainant on May 30, 2008. The Custodian also states that no redactions were made to the executive session minutes. The Custodian further states that a signed copy of the Certificate of Determination responsive to the second (2<sup>nd</sup>) OPRA request was never located and was probably never signed. The Custodian states that an unsigned copy of the draft Certificate of Determination is a draft record and considered attorney work product and therefore is not an official public record.

### **December 13, 2010**

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

- Complainant’s first (1<sup>st</sup>) OPRA request dated November 29, 2010
- Complainant’s second (2<sup>nd</sup>) OPRA request dated November 30, 2010
- Custodian’s response to the Complainant’s first (1<sup>st</sup>) and (2<sup>nd</sup>) OPRA requests dated December 8, 2010<sup>4</sup>
- A copy of one (1) page of the UCBOE executive session minutes dated June 13, 2000.

### OPRA request dated November 29, 2010:

The Complainant states that the Custodian denied his OPRA request on December 8, 2010 stating that an unredacted copy of the record responsive was previously provided to the Complainant on May 30, 2008 and further, no redactions to the executive session minutes were made. The Complainant also states that the Custodian provided him with a copy of these executive session minutes on November 10, 2010, which only states: “Sabino Valdes tenure charges discussed.”<sup>5</sup> The Complainant further argues that the provisions of N.J.S.A. 10:4-13 are an effort to establish a compromise in those areas where public observance and attendance would actually be contrary to the public interest. The Complainant also argues that a public body may exclude the public from the discussion of those subjects listed in N.J.S.A. 10:4-12.

The Complainant states that according to the Custodian’s response dated December 8, 2010, no redactions were made to the executive session minutes dated June 13, 2000. The Complainant states that therefore, UCBOE did not discuss his tenure charges on June 13, 2000. The Complainant also states that this cannot be true and thus the Custodian is concealing public information. The Complainant requests that the GRC direct the Custodian to disclose the executive session minutes dated June 13, 2000 without redactions.

### OPRA request dated November 30, 2010:

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<sup>4</sup> The Custodian responded on the Complainant’s OPRA request form.

<sup>5</sup> The Complainant does not provide a letter from the Custodian stating that a copy of these minutes was provided pursuant to an OPRA request. However, the Custodian’s response on December 8, 2010 indicates that the Custodian provided a copy of these executive session minutes on May 30, 2008.

The Complainant states that the Custodian denied access to the signed copy of the draft Certificate of Determination relevant to the tenure charges dated April 27, 2000 because a signed copy was never located as was probably never signed on December 8, 2010. The Complainant also states that the Custodian denied access to the unsigned copy of the draft Certificate of Determination relevant to the tenure charges dated April 27, 2000 because it is a draft record and considered attorney work product and therefore is not an official public record on December 8, 2010.

The Complainant argues that in O’Shea v. West Milford Board of Education, 391 N.J. Super. 534 (App. Div. 2007), the Appellate Division remanded the matter to the GRC so it could conduct an *in camera* review of the requested handwritten notes. The GRC concluded that the handwritten notes constituted a work in progress, as opposed to a completed draft, and thus such notes need not be released. The Complainant states that pursuant to N.J.S.A. 18A:6-11, UCBOE is required to create and file a Certificate of Determination which assures that the Commissioner of Education found probable cause to certify tenure charges. The Complainant also states that on April 17, 2000, UCBOE filed tenure charges against the Complainant. The Complainant further states that UCBOE has the unsigned draft of the Certificate of Determination relevant to the tenure charges dated April 27, 2000. The Complainant argues that unlike in O’Shea, supra, the unsigned draft of the Certificate of Determination is not a “work in progress” record. The Complainant also argues that this record was created by UCBOE pursuant to N.J.S.A. 18A:6-11 and is currently on file, thus it is a government record subject to OPRA. The Complainant further argues that contrary to the Custodian’s reason for its denial of the unsigned Certificate of Determination, the Custodian recently disclosed a copy of draft meeting minutes from a meeting held on September 13, 2000 with his Statement of Information (“SOI”) in the matter of Valdes v. Union City Board of Education (Hudson), GRC Complaint No. 2010-285.

The Complainant does not agree to mediate this complaint.

**December 14, 2010**

Request for the SOI sent to the Custodian.

**December 22, 2010**

Custodian’s SOI with the following attachments:

- Complainant’s first (1<sup>st</sup>) OPRA request dated November 29, 2010
- Complainant’s second (2<sup>nd</sup>) OPRA request dated November 30, 2010
- Custodian’s response to the first (1<sup>st</sup>) and second (2<sup>nd</sup>) OPRA requests dated December 8, 2010
- A copy of one (1) page of the UCBOE executive session minutes dated June 13, 2000.

OPRA request dated November 29, 2010:

The Custodian certifies that no search efforts were undertaken or necessary because the only page of the requested executive session minutes that exists was provided

to the Complainant on May 30, 2008. The Custodian also certifies that no redactions were made to such minutes.

The Custodian certifies that the executive session minutes responsive to the Complainant's first (1<sup>st</sup>) OPRA request must be permanently kept 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 denied the Complainant's OPRA request dated November 29, 2010 because the Custodian provided a copy of the only page of the executive session minutes that exists to the Complainant on May 30, 2008. The Custodian also certifies that the Complainant acknowledges receipt of these executive session minutes but argues that the executive session minutes were redacted. The Custodian further certifies that the executive session minutes were not redacted and the Custodian provided the Complainant with the only copy of the executive session minutes in UCBOE's possession. The Custodian argues that he did not violate OPRA by denying the Complainant's request for the executive session minutes that the Custodian previously provided to the Complainant. The Custodian also argues that UCBOE cannot create records to respond to the Complainant's OPRA request. The Custodian further argues that there is no basis for the Complainant's assertions that the executive session minutes were redacted.

#### OPRA request dated November 30, 2010:

The Custodian certifies that on August 7, 2008 the Complainant filed an OPRA request for the unsigned Certificate of Determination relevant to the tenure charges dated April 27, 2000.<sup>6</sup> The Custodian also certifies that the Complainant previously conducted an on-site inspection of approximately seventeen (17) boxes relevant to the Complainant's tenure charges and located the unsigned Certificate of Determination therein and thereafter filed his OPRA request dated August 7, 2008 for the unsigned Certificate of Determination relevant to the Complainant's tenure charges filed on April 27, 2000.<sup>7</sup> The Custodian further certifies that his request dated August 7, 2008 was denied because the unsigned Certificate of Determination relevant to the tenure charges dated April 27, 2000 is exempt from disclosure under OPRA as attorney work product. The Custodian certifies that the Complainant challenged UCBOE's denial and UCBOE responded on August 25, 2008 explaining that an unsigned draft of the Certificate of Determination relevant to the tenure charges dated April 27, 2000 is privileged and not within the meaning of a public record.<sup>8</sup> The Custodian also certifies that the unsigned Certificate of Determination relevant to the tenure charges dated April 27, 2000 was attached to a letter dated June 13, 2000 written by former UCBOE Counsel to the former UCBOE Secretary. The Custodian further certifies that this letter dated June 13, 2000 is not being provided with this SOI, but is available for an *in camera* review.<sup>9</sup> The Custodian certifies that the Certificate of Determination relevant to the tenure charges

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<sup>6</sup> The Custodian included a copy of this OPRA request and his response thereto with the SOI. The Complainant's OPRA request dated August 7, 2008 is not at issue herein.

<sup>7</sup> The Custodian does not certify when the Complainant conducted this on-site inspection.

<sup>8</sup> The Custodian included a copy of this letter with the SOI.

<sup>9</sup> The Complainant did not seek a copy of this letter in his OPRA request dated November 30, 2010.

dated April 27, 2000 was never signed because the matter regarding the Complainant's tenure charges was tabled at the June 13, 2000 meeting. The Custodian certifies that UCBOE's Counsel located a letter dated June 21, 2001 from former UCBOE Counsel, Thomas Kobin, Esq., to the Honorable Steven Weiss, A.L.J..<sup>10</sup> The Custodian also certifies that this letter references the Certificate of Determination executed by former UCBOE Secretary on September 19, 2000.<sup>11</sup> Lastly, the Custodian certifies that based upon the foregoing, a signed copy of the Certification of Determination relevant to the tenure charges dated April 27, 2000 does not exist.

The Custodian certifies that if the unsigned copy of the Certificate of Determination relevant to the tenure charges dated April 27, 2000 is part of the personnel file, then the record retention requirement is six (6) years after termination of employment, and if the Certificate of Determination is not part of the personnel file then said record must be kept for eighty (80) years in accordance with the Records Destruction Schedule established and approved by DARM. The Custodian further certifies that the unsigned Certificate of Determination relevant to the tenure charges dated April 27, 2000 was located with UCBOE's Counsel's files, and thus there is no retention period of which the Custodian is aware.

The Custodian certifies that on December 8, 2010 he denied the Complainant's OPRA request dated November 30, 2010 for the unsigned Certificate of Determination relevant to the tenure charges dated April 27, 2000 because the unsigned copy is a draft document and thus is considered advisory, consultative and deliberative and also attorney work product which is exempt from disclosure under OPRA pursuant to N.J.S.A. 47:1A-1.1. The Custodian also certifies that a signed copy of the Certificate of Determination relevant to the tenure charges dated April 27, 2000 does not exist.

### Analysis

#### **Whether the Custodian properly responded to the Complainant's OPRA request dated November 29, 2010?**

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:

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<sup>10</sup> The Custodian included a copy of this letter with the SOI.

<sup>11</sup> This Certificate of Determination was provided with the SOI in the matter of Valdes v. Union City Board of Education (Hudson), GRC Complaint No. 2010-249. Furthermore, this Certificate of Determination is for tenure charges dated August 2000, not April 2000 as the Complainant seeks.

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“[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 in writing to the Complainant’s first (1<sup>st</sup>) 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 executive session minutes that could be located was already provided to the Complainant in response to a prior OPRA request on May 30, 2008 and informing the Complainant that no redactions were made to the executive session minutes.

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.”

Therefore, because the Custodian’s response to the Complainant’s OPRA request failed to specify a lawful basis for a denial for the executive session minutes sought in the OPRA request dated November 29, 2010, but merely stated that the only page said executive session minutes 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).

Although the Complainant attached to his Denial of Access Complaint a copy of the executive session minutes dated June 13, 2000 which the Custodian asserts were previously provided to the Complainant on May 30, 2008, the Complainant clearly asserted in the Denial of Access Complaint that he sought a more complete version of the requested executive session minutes than that page already in his possession, and also asserted that the minutes provided to him were unlawfully redacted.

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 Dep't, 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).”

Thus, the facts in the instant matter are distinguishable from Bart. In Bart, the complainant had in his possession the record he was seeking the time of his OPRA request. However, in the matter before the Council, although the Complainant included a copy of the executive session minutes with his Denial of Access Complaint, the Complainant argued that he sought a more complete version of the executive session minutes dated June 13, 2000. Therefore, the Appellate Division’s holding in Bart does not apply to the instant case.

**Whether a complete version of the UCBOE executive session minutes dated June 13, 2000, which are the subject of the Complainant’s November 29, 2010 OPRA request, exists?**

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.

The Complainant filed this complaint contending that the Custodian unlawfully denied access to a complete set of the UCBOE executive session minutes dated June 13, 2000. The Custodian subsequently certified in the SOI that he denied the Complainant’s November 29, 2010 OPRA request because the Custodian provided a copy of the only page of the executive session minutes that exists to the Complainant on May 30, 2008.

Pursuant to *N.J.A.C.* 1:1-15.2(a) and (b), official notice may be taken of judicially noticeable facts (as explained in N.J.R.E. 201 of the New Jersey Rules of Evidence), as well as of generally recognized technical or scientific facts within the specialized knowledge of the agency or the judge. The Appellate Division has held that it was appropriate for an administrative agency to take notice of an appellant’s record of convictions, because judicial notice could have been taken of the records of any court in New Jersey, and appellant's record of convictions were exclusively in New Jersey. *See Sanders v. Division of Motor Vehicles*, 131 N.J. Super. 95 (App. Div. 1974).

Thus, the Council takes judicial notice of the Council's decision in Valdes v. Union City Board of Education (Hudson), GRC Complaint No. 2010-218 (March 2010), which involves the same parties as in the matter before the Council. In said complaint, the Complainant sought a copy of the same executive session minutes from the UCBOE meeting on June 13, 2000 as in the present complaint. Furthermore, in the SOI for GRC Complaint 2010-218, the Custodian certified that the remainder of the requested executive session minutes could not be located after an extensive search for such records. The Council held that because the Custodian 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 bore 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)..

Therefore, because the Council takes judicial notice of Valdes v. Union City Board of Education (Hudson), GRC Complaint No. 2010-218 (March 2010), in which the Council held that the Custodian could not locate the executive session minutes responsive to the Complainant's OPRA request and the Complainant again requested the same executive session minutes in the request subject of this complaint, the Custodian has borne his burden of proving that he did not unlawfully deny access to the executive session minutes dated June 13, 2000 requested in the matter herein. N.J.S.A. 47:1A-6. See 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).

**Whether an *unsigned* copy of the draft Certificate of Determination relevant to the tenure charges filed upon the Complainant on April 27, 2010 is exempt from disclosure under OPRA?**

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 ... The terms shall not include inter-agency or intra-agency *advisory, consultative, or deliberative material.*" (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.

In the instant complaint, the Complainant’s OPRA request dated November 30, 2010 sought a copy of an *unsigned draft* Certificate of Determination relevant to the tenure charges filed upon the Complainant on April 27, 2000. The Custodian responded to this request stating that an unsigned copy of the draft Certificate of Determination is a draft record and is considered attorney work product and not an official public record. Conversely, the Complainant asserted in his Denial of Access Complaint that pursuant to N.J.S.A. 18A:6-11,<sup>12</sup> UCBOE is required to create and file a Certificate of Determination with the Commissioner of Education after UCBOE finds probable cause to certify tenure charges. The Complainant also asserted that contrary to UCBOE’s reason for its denial, the Custodian recently disclosed a copy of draft meeting minutes from a meeting held on September 13, 2000 with his SOI for Valdes v. Union City Board of Education (Hudson), GRC Complaint No. 2010-285.

The Custodian certified in the SOI that an unsigned copy of the Certificate of Determination is a draft document and thus is considered advisory, consultative and deliberative (“ACD”) material exempt from disclosure under OPRA. The Custodian also certified that the Board tabled the tenure charges filed against the Complainant for the June 13, 2000 meeting. The Custodian further certified that since this matter was postponed, the Certificate of Determination was never signed. Thus, UCBOE never determined whether there was probable cause to support the Complainant’s tenure charges dated April 27, 2000. The Council notes that the Complainant was requesting a *draft* unsigned copy of the Certificate of Determination. The Council also notes that although the Custodian disclosed a copy of draft meeting minutes from a meeting held on September 13, 2000 with an SOI for GRC Complaint No. 2010-285, the Custodian can still certify and argue that an unsigned copy of the draft Certificate of Determination is considered ACD.

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<sup>12</sup> N.J.S.A. 18A:6-11 states:

“Any charge against any employee...under tenure...shall be filed with the secretary of the board in writing...After consideration of the charge...the board shall determine by majority vote...whether there is probable cause to credit the evidence in support of the charge and whether such charge...is sufficient to warrant a dismissal or reduction in salary...In the event the board finds that such probable cause exists and that the charge...is sufficient to warrant a dismissal or reduction in salary, then [the board] shall forward such written charge to the commissioner [of education] for a hearing...together with such Certificate of Determination.”

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

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

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

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

application, the balance is said to have been struck in favor of non-disclosure.” (Citations omitted.) *Id.* at 84-85.

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

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

In In Re Liquidation of Integrity, *supra*, 165 N.J. at 84-5, the judiciary set forth the legal standard for applying the deliberative process privilege as follows:

- (1) The initial burden falls on the government agency to establish that matters are both *pre-decisional* and *deliberative*.
  - a. Pre-decisional means that the records were generated before an agency adopted or reached its decision or policy.
  - b. Deliberative means that the record contains opinions, recommendations, or advice about agency policies or decisions.
    - i. Deliberative materials do not include purely factual materials.
    - ii. Where factual information is contained in a record that is deliberative, such information must be produced so long as the factual material can be separated from its deliberative context.
  - c. The exemption covers recommendations, draft documents, proposals, suggestions, and other subjective documents, which *reflect the personal opinions of the writer rather than the policy of the agency*.
  - d. Documents which are protected by the privilege are those which *would inaccurately reflect or prematurely disclose the views of the agency, suggesting as agency position that which is only a personal position*.
  - e. To test whether disclosure of a document is likely to adversely affect the purposes of the privilege, courts ask themselves *whether the*

*document is so candid or personal in nature that public disclosure is likely in the future to stifle honest and frank communications within the agency.*

- (2) Please note that if an *in camera* inspection were conducted by the courts, the process would include the following:

Once it has been determined that a record is deliberative, there is a presumption against disclosure and the party seeking the document has the burden of establishing his or her compelling or substantial need for the record.

- a. That burden can be met by a showing of:
- i. the importance of the information to the requesting party,
  - ii. its availability from other sources **and**
  - iii. the effect of disclosure on frank and independent discussion of contemplated government policies.

Because the Custodian certified in his SOI that the Certificate of Determination was never signed because UCBOE did not determine whether there was probable cause for the Complainant's tenure charges, an unsigned copy of the draft Certificate of Determination relevant to the tenure charges filed upon the Complainant on April 27, 2000 is considered advisory, consultative and deliberative material and is therefore exempt from disclosure under OPRA pursuant to N.J.S.A. 47:1A-1.1 and In Re Liquidation of Integrity Insurance Co., 165 N.J. 75 (2000).

**Whether a “signed copy of the draft Certificate of Determination relevant to the tenure charges filed upon the Complainant on April 27, 2000” responsive to the Complainant’s OPRA request dated November 30, 2010 exists?**

The Complainant's OPRA request dated November 30, 2010 sought a “signed copy of the draft Certificate of Determination relevant to the tenure charges filed upon the Complainant on April 27, 2000.” The Custodian timely responded to the Complainant's request stating that a signed copy of the Certificate of Determination was never located and was probably never signed. The Custodian certified in the SOI that the Certificate of Determination was never signed because this matter was tabled at the June 13, 2000 meeting. Moreover, the Custodian certified in the SOI that a signed copy of the Certificate of Determination does not exist. The Complainant has submitted no evidence to refute the Custodian's certification in this regard.

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 certified in the Statement of Information that a signed copy of the Certificate of Determination relevant to the tenure charges filed upon the Complainant on April 27, 2000 does not exist and because there is no evidence in the record to refute the Custodian's certification, the Custodian has not unlawfully denied the Complainant access to the requested records pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005). N.J.S.A. 47:1A-6.

**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 evidence of record indicates that the Complainant filed his first (1<sup>st</sup>) OPRA request on November 29, 2010. The evidence of record further indicates that the Custodian timely responded to this OPRA request denying access to the requested executive session minutes stating that the only page of these executive session minutes that could be located was previously provided to the Complainant. The Complainant also informed the Custodian that the executive session minutes were not redacted. Further, the Custodian certified that a draft, unsigned copy of the Certificate of Determination relevant to the tenure charges filed upon the Complainant on April 27, 2000 does not exist and would be exempt from disclosure as advisory, consultative or deliberative material if it did exist.

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 dated November 29, 2010 because the Custodian did not provide a lawful basis for the denial of access to the requested records. However, the Council takes judicial notice of Valdes v. Union City Board of Education (Hudson), GRC Complaint No. 2010-218, in which the Council decided that a more complete copy of the UCBOE executive session minutes dated June 13, 2000 does not exist, an unsigned copy of the draft Certificate of Determination relevant to the tenure charges filed upon the Complainant on April 27, 2000 is considered advisory, consultative and deliberative material and is therefore exempt from disclosure under OPRA pursuant to N.J.S.A. 47:1A-1.1, and no records exist which are responsive to the Complainant's request for a signed copy of the Certificate of Determination relevant to the tenure charges filed upon the Complainant on April 27, 2000. 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 for the executive session minutes sought in the OPRA request dated November 29, 2010, but merely stated that the only page said executive session minutes 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 Council takes judicial notice of Valdes v. Union City Board of Education (Hudson), GRC Complaint No. 2010-218 (March 2010), in which the Council held that the Custodian could not locate the executive session minutes responsive to the Complainant's OPRA request and the Complainant again requested the same executive session minutes, the Custodian has borne his burden of proving that he did not unlawfully deny access to the executive session minutes dated June 13, 2000 requested in the matter herein. N.J.S.A. 47:1A-6. See 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. Because the Custodian certified in his Statement of Information that the Certificate of Determination was never signed because UCBOE did not determine whether there was probable cause for the Complainant's tenure charges, an unsigned copy of the draft Certificate of Determination relevant to the tenure charges filed upon the Complainant on April 27, 2000 is considered advisory, consultative and deliberative material and is therefore exempt from disclosure under OPRA pursuant to N.J.S.A. 47:1A-1.1 and In Re Liquidation of Integrity Insurance Co., 165 N.J. 75 (2000).
4. Because the Custodian certified in the Statement of Information that a signed copy of the Certificate of Determination relevant to the tenure charges filed upon the Complainant on April 27, 2000 does not exist and because there is no evidence in the record to refute the Custodian's certification, the Custodian has not unlawfully denied the Complainant access to the requested records pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005). N.J.S.A. 47:1A-6.
5. 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 dated November 29, 2010 because the Custodian did not provide a lawful basis for the denial of access to the requested records. However, the Council takes judicial notice of Valdes v. Union City Board of Education (Hudson), GRC Complaint No. 2010-218, in which the Council decided that a more complete copy of the UCBOE executive session minutes dated June 13, 2000 does not exist, an unsigned copy of the draft Certificate of Determination relevant to the tenure charges filed upon the Complainant on April 27, 2000 is considered advisory, consultative and deliberative material and is therefore exempt from disclosure under OPRA pursuant to N.J.S.A. 47:1A-1.1, and no records exist which are responsive to the Complainant's request for a signed copy of the Certificate of Determination relevant to the tenure charges filed upon the Complainant on April 27, 2000. 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.

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Executive Director

April 18, 2012