



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Commissioner

FINAL DECISION

July 31, 2012 Government Records Council Meeting

Sabino Valdes
Complainant

Complaint No. 2011-139

v.

Union City Board of Education (Hudson)
Custodian of Record

At the July 31, 2012 public meeting, the Government Records Council (“Council”) considered the July 24, 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. Although the Custodian responded to the Complainant’s OPRA request in writing in a timely manner, his response to the Complainant’s OPRA request was insufficient pursuant to N.J.S.A. 47:1A-5.g. and Caggiano v. Borough of Stanhope (Sussex), GRC Complaint No. 2005-211 (January 2006) because his response that the Complainant was previously provided with all responsive records failed to contain a lawful basis for denying access to said OPRA request.
2. The Custodian certified in the Statement of Information that no executive session minutes for the Union City Board of Education’s March 29, 2001 caucus meeting existed and the Complainant failed to submit any evidence to refute the Custodian’s certification. Thus, the Custodian did not unlawfully deny access to the requested minutes pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).
3. Although the Custodian’s response to the Complainant’s OPRA request was insufficient pursuant to N.J.S.A. 47:1A-5 and Caggiano v. Borough of Stanhope (Sussex), GRC Complaint No. 2005-211 (January 2006), the Custodian did not unlawfully deny access to the requested records because same do not exist. Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005). 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 insufficient response does 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 31st Day of July, 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: August 6, 2012

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
July 31, 2012 Council Meeting**

**Sabino Valdes¹
Complainant**

GRC Complaint No. 2011-139

v.

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

Records Relevant to Complaint: Copy of the approved executive session minutes of the caucus meeting conducted by the Union City Board of Education (“UCBOE”) on March 29, 2001 including the resolution presented and approved by the UCBOE to rescind a resolution previously adopted by the UCBOE on September 19, 2000.

Request Made: March 28, 2011

Response Made: April 6, 2011

Custodian: Anthony Dragona

GRC Complaint Filed: April 26, 2011³

Background

March 28, 2011

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

April 6, 2011

Custodian’s response to the OPRA request. The Custodian responds in writing to the Complainant’s OPRA request on the OPRA request form on the seventh (7th) business day following receipt of such request. The Custodian states that access to the requested record is denied because he already provided the Complainant with the only responsive minutes in the UCBOE’s possession on November 23, 2010.

April 26, 2011

Denial of Access Complaint filed with the Government Records Council (“GRC”) with the following attachments:⁴

¹ No legal representation listed on record.

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

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

⁴ The Complainant attached additional records that are not relevant to the instant complaint.

- “Resolution Rescinding Prior Resolution, Which Had Approved Settlement of Tenure Charges” dated March 29, 2001.
- Caucus & regular session agenda dated March 29, 2001.
- Caucus minutes dated March 29, 2001.
- Regular session minutes of the UCBOE dated March 29, 2001.
- Executive session minutes of the UCBOE dated March 29, 2001 (with redactions).
- “Certification of Determination” dated April 2, 2011.
- Letter from Mr. Thomas R. Kobin, Esq., to Ms. Deborah Antanaitis, Director of the New Jersey Department of Education (“DOE”), dated April 4, 2001.
- Complainant’s OPRA request dated October 4, 2010 with the Custodian’s response thereon October 7, 2010.
- Complainant’s OPRA request dated November 10, 2010 with the Custodian’s response thereon dated November 23, 2010.
- Complainant’s OPRA request dated November 29, 2010 with the Custodian’s response thereon dated December 8, 2010.
- Complainant’s OPRA request dated December 20, 2010 with the Custodian’s response thereon dated January 4, 2011.
- Complainant’s OPRA request dated January 24, 2011 with the Custodian’s response thereon dated February 3, 2011.
- Custodian’s Statement of Information (“SOI”) for GRC Complaint No. 2011-47 dated March 23, 2011.
- “Government Records Request Receipt” from DOE dated March 29, 2011.
- Complainant’s OPRA request dated March 28, 2011 with the Custodian’s response thereon dated April 6, 2011.

The Complainant states that on March 29, 2001, the UCBOE certified a resolution rescinding a prior resolution approving a settlement of tenure charges. The Complainant states that the UCBOE notified and provided a copy of the new resolution to DOE.

The Complainant states that in response to an OPRA request on October 27, 2010, the Custodian granted access to minutes from a “special or regular meeting” held on March 29, 2001, including the UCBOE’s motion to go into executive session. The Complainant states that the Custodian stated that the minutes consisted of 53 pages; however, the Custodian only provided 36 pages to the Complainant and no motion to go into executive session was included.

The Complainant states that he thus filed another OPRA request on November 11, 2010 for minutes of the “executive ... and regular session” held on March 29, 2001, including the UCBOE’s motion to go into executive session pursuant to N.J.S.A. 10:4-13. The Complainant states that the Custodian responded on November 29, 2010 granting access to the same record previously provided. The Complainant states that he thus submitted another OPRA request on the same day for the same records again including the motion to go into closed session. The Complainant states that the Custodian responded on December 12, 2010 denying access to said request stating that he previously offered the only record in the UCBOE’s possession. The Complainant asserts

that the Custodian failed to note that the executive session minutes he provided were part of a caucus meeting.

The Complainant states that after obtaining a copy of the March 29, 2001 agenda and caucus minutes pursuant to OPRA requests not at issue herein, he noticed that the agenda did not reflect that the UCBOE approved the rescinding resolution. The Complainant further states that he also noticed that the executive session minutes indicated the executive session ended at 7:00 p.m. and the regular session did not begin until 8:00 p.m. The Complainant asserts that this confirms that no executive session was held at the regular meeting and the records provided were not responsive to his multiple requests.

The Complainant states on January 24, 2011, he filed another OPRA request for the March 29, 2001 minutes and a certification from the Custodian confirming that the record is a true copy of the original kept at his office. The Complainant states that the Custodian denied his request on February 3, 2011.⁵

The Complainant states that on March 29, 2011, the New Jersey Department of Education granted access to the Certificate of Determination in relevant tenure matter. The Complainant states that the Certificate notes that on March 29, 2001, "... the [UCBOE] met in closed session at about 6:05 p.m. ..." The Complainant states that neither the agenda nor minutes he received from the UCBOE contain a recommendation or resolution regarding the tenure matter.

The Complainant states that the UCBOE cannot contest the following:

1. The Custodian granted access to previous requests for minutes of the UCBOE's March 29, 2001 regular and executive session minutes.
2. The Custodian provided the Complainant with the responsive minutes including the adoption of the rescinding resolution.
3. No executive session was held by the UCBOE at its March 29, 2001 regular meeting.
4. The UCBOE's agenda does not reflect that the UCBOE considered the rescinding resolution at its regular meeting.
5. Neither the UCBOE's March 29, 2001 agenda nor regular session minutes make any reference to a rescinding resolution or the tenure charge matter.
6. According to the Custodian, the UCBOE adopted the rescinding resolution at its March 29, 2001 caucus meeting.

The Complainant states that based on the foregoing, he submitted the OPRA request relevant to this complaint on March 28, 2011 seeking the executive session minutes of the caucus meeting held on March 29, 2001. The Complainant states that the Custodian responded on April 6, 2011 denying access to the Complainant's OPRA

⁵ The Complainant notes that he subsequently filed a complaint with the GRC: Valdes v. Union City Board of Education (Hudson), GRC Complaint No. 2011-47 (May 2012). The subject OPRA request sought "minutes from the regular and executive session of a special meeting held ... on March 29, 2001." Sabino Valdes v. Union City Board of Education (Hudson), 2011-139 – Findings and Recommendations of the Executive Director 3

request stating that he already provided the Complainant with the only executive session minutes in the UCBOE's possession on November 23, 2010.

The Complainant states that OPRA provides that "...government records shall be readily accessible for inspection, copying, or examination by the citizens of this State ..." N.J.S.A. 47:1A-1. The Complainant states that OPRA further defines government records as any record "...made, maintained or kept on file in the course of ... official business by any officer, commission, agency or authority of the State or of any political subdivision thereof ... or that has been received in the course of ... official business ..." N.J.S.A. 47:1A-1.1. The Complainant states that a custodian must respond to an OPRA request in writing within seven (7) business days granting access or denying access and stating the specific basis for said denial. N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. The Complainant further states that a public agency "... shall have the burden of proving that the denial of access is authorized by law." N.J.S.A. 47:1A-6.

The Complainant states that the requested minutes are government records pursuant to Davis v. Rumsen Fair-Haven Board of Education, GRC Complaint No. 2003-56 (December 2003). The Complainant states that although the Custodian is required to grant or deny access to records, he cannot provide a fake record in order to hide that he is actually denying access to same. The Complainant contends that the Custodian provided executive session minutes of the regular meeting and then claimed that the executive session minutes were actually part of the caucus meeting. The Complainant contends that the Custodian must (1) deny the Complainant's OPRA request on the basis that no records responsive exist, or (2) grant access to the responsive minutes.

The Complainant does not agree to mediate this complaint.

May 26, 2011

Request for the SOI sent to the Custodian.

June 3, 2011

Custodian's SOI with the following attachments:

- Letter from the Custodian to the Complainant dated February 3, 2011.
- Complainant's OPRA request dated March 28, 2011 with the Custodian's response thereon dated April 6, 2011.

The Custodian certifies that his search for the requested records involved his assistant and Counsel expending half an hour reviewing the Complainant's prior OPRA requests to ensure that the Complainant was previously provided with the responsive record. The Custodian certifies that his assistant and Counsel determined that the UCBOE previously provided the responsive record with partial redactions to the Complainant on November 23, 2010.

The Custodian also certifies that the last date upon which records that may have been responsive to the request were destroyed in accordance with the Records Destruction Schedule established and approved by Records Management Services is not applicable.

The Custodian certifies that he received the Complainant's OPRA request on March 28, 2011. The Custodian certifies that he responded in writing to the Complainant on April 6, 2011 stating that he had already provided the Complainant with the only March 29, 2001 executive session minutes in the UCBOE's possession (with redactions) on November 23, 2010. The Custodian certifies that the UCBOE does not have an executive session for caucus meetings and that the only executive session minutes that exist are those from the regular meeting.

The Custodian states that because the Complainant addressed in the Denial of Access Complaint a history of requests leading up to the one at issue herein, the Custodian will also address same.

The Custodian states that on October 4, 2010, the Complainant requested minutes of the special or regular meeting held by the UCBOE on March 29, 2001 including "... the motion [(“motion”)] to go into executive session.” The Custodian states that the UCBOE provided the Complainant with the requested minutes. The Custodian further asserts that OPRA does not require a custodian to search through its minutes to ensure that the motion was contained in the minutes. The Custodian states that because the UCBOE incorrectly counted the number of pages responsive, the Complainant submitted another request on November 11, 2010 for the same records with a certification. The Custodian states that the UCBOE again granted access to the minutes advising that the minutes were not certified, but represented the only copy the UCBOE possessed. The Custodian notes that the executive session portion of the minutes was partially redacted. The Custodian reiterates that a custodian is not required to search through the minutes to ensure the motion present in the minutes.

The Custodian states that because the Complainant claimed the minutes did not contain the motion, he submitted another request on November 29, 2010. The Custodian states that the UCBOE denied access to this request stating that the only responsive records that exist were provided. The Custodian disputes the Complainant's argument that the Custodian failed to advise that the executive session minutes provided were part of the caucus meeting. The Custodian asserts that a custodian is not required to answer questions: a custodian is only required to provide access to government records.

The Custodian states that on December 20, 2010, the Complainant requested a copy of the agenda for March 29, 2001, which the Custodian provided. The Custodian asserts that he was not the custodian of record in 2001 and has no control over the content of the agenda. The Custodian states that on January 24, 2011, the Complainant made his second (2nd) request for certified March 29, 2001 minutes and third (3rd) request for minutes overall. The Custodian states that he responded in writing on February 3, 2011 denying access to the Complainant's OPRA request and advising that all responsive minutes in the UCBOE's possession were provided to the Complainant. The Custodian states that he further advised that OPRA does not require custodians to certify to the validity of the records provided.

The Custodian states that in the Denial of Access Complaint, the Complainant disputed the timing of the various minutes. The Custodian states that the Complainant argued that because the executive session began at 6:05 p.m. and ended at 7:00 p.m., the

regular session did not begin until 8:00 p.m. and there was no motion by the UCBOE to go into executive session, the timing proves that the UCBOE did not have an executive session on March 29, 2001. The Custodian contends that the caucus minutes, which began at 5:00 p.m., show that the UCBOE moved to go into executive session at 5:10 p.m.

The Custodian certified that the Complainant never previously requested the caucus meeting minutes. The Custodian asserts that had the Complainant requested the caucus minutes, he would have been provided with same. The Custodian certifies that the caucus meeting did start at 5:00 p.m. and the UCBOE voted to go into executive session at 5:10 p.m. The Custodian certifies that the executive session started at 6:05 p.m. and ended at 7:00 p.m. The Custodian certifies that the UCBOE began its regular meeting at 8:00 p.m. The Custodian thus certifies that the Complainant is in possession of all minutes that exist for March 29, 2001. The Custodian certifies that, although the Complainant is convinced that some second set of executive session minutes exists, no records beyond those already provided exist.

The Custodian notes that the Complainant submitted a “Certification of Determination” to support that other minutes exist; however, the certification also states that the UCBOE went into executive session at 6:05 p.m. The Complainant certifies that the certification thus verifies the minutes and the Custodian’s SOI statement that no other records exist. The Custodian states that to answer the Complainant’s conclusory statements:

1. The Custodian does not dispute that he granted access to the Complainant’s request for executive and regular session minutes for March 29, 2001.
2. The Custodian does not dispute that he provided the Complainant with the minutes including the adoption of the rescinding resolution.
3. The Custodian disputes that he ever acknowledged the executive session minutes were from a caucus meeting. The Custodian notes that a custodian is not obligated to disclose anything other than what was requested, if the record exists. The Custodian further certifies that the executive session minutes were not part of the caucus meeting because the UCBOE does not have separate executive sessions for caucus and regular meetings.
4. The Custodian disputes that the UCBOE did not hold an executive session on March 29, 2001. The Custodian certifies that he provided the Complainant with the executive session minutes proving that the UCBOE did hold an executive session.
5. The Custodian does not dispute that the UCBOE’s March 29, 2001 agenda and minutes fail to reference the rescinding resolution in the tenure charge matter. The Custodian certifies that the rescinding resolution is contained in the executive session minutes because it was a personnel matter only suitable for discussion in executive session.
6. The Custodian disputes that he acknowledged that the UCBOE adopted the rescinding resolution at its March 29, 2001 caucus meeting because he cannot find any evidence of this statement in either the Denial of Access Complaint or the evidence attached thereto.

The Custodian contends that the Complainant has convinced himself that some other records exist, thus he submitted the OPRA request at issue herein. The Custodian certifies that he denied access to said request stating that he previously provided the Complainant all minutes that existed for March 29, 2001. The Custodian certifies that his request was further denied because there are no executive session minutes for the caucus meeting: there are only caucus meeting minutes, executive session minutes and regular session minutes. The Custodian certifies that the Complainant was provided with all three (3) sets of minutes and no other minutes exist.

Analysis

Whether the Custodian's response to the Complainant's OPRA request was sufficient?

OPRA provides that:

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

Further, OPRA provides that:

“[u]nless a shorter time period is otherwise provided by statute, regulation, or executive order, a custodian of a government record shall grant access ... or deny a request for access ... as soon as possible, but *not later than seven business days after receiving the request* ... In the event a custodian fails to respond within seven business days after receiving a request, *the failure to respond shall be deemed a denial of the request* ...” (Emphasis added.) N.J.S.A. 47:1A-5.i.

In the instant complaint, the Custodian responded in writing to the Complainant's OPRA request on the seventh (7th) business day after receipt of same denying access and stating that he already provided the Complainant with the only responsive minutes in the UCBOE's possession on November 23, 2010.

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, although the Custodian responded to the Complainant's OPRA request in writing in a timely manner, his response to the Complainant's OPRA request was insufficient pursuant to N.J.S.A. 47:1A-5.g. and Caggiano, because his response that the

Complainant was previously provided with all responsive records failed to contain a lawful basis for denying access to said OPRA request.

Whether the Custodian unlawfully denied access to the requested minutes?

OPRA provides that:

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

Additionally, OPRA defines a government record as:

“... any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof, that has been *made, maintained or kept on file ... or that has been received* in the course of his or its official business ...” (Emphasis added.) N.J.S.A. 47:1A-1.1.

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

“...[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 herein contends that the Custodian attempted to hide his denial of access to the requested March 29, 2001 executive session minutes of the caucus meeting by providing access to other records. The Complainant argued that the session times reflected in the minutes previously provided and the Certificate of Determination proved that the UCBOE never held an executive session for the regular meeting and that the responsive minutes were actually from the caucus meeting. As part of the Denial of Access Complaint, the Complainant included caucus minutes, executive session minutes and regular session minutes that he was provided in response to previous OPRA requests.

The Custodian certified in the SOI that he provided the Complainant with all March 29, 2001 minutes that were in the UCBOE’s possession. The Custodian further certified that the UCBOE does not hold separate executive sessions for caucus and regular meetings. The Custodian also certified that minutes themselves as well as the Certificate proved that the UCBOE conducted a caucus meeting, executive session and regular meeting on March 29, 2001 and that the Complainant received the only minutes that existed for all meetings. The Custodian further certified that because the UCBOE does not engage in separate executive sessions for the caucus and regular meetings, no responsive minutes exist.

Thus, the crux of this complaint is whether the Custodian unlawfully denied access to the Complainant's OPRA request for executive session minutes from the March 29, 2001 caucus meeting. The Complainant submitted an extensive history of how he came to submit the OPRA request at issue herein; however, this evidence does not refute the Custodian's certification that only three (3) sets of minutes for March 29, 2001 exist. Moreover, the evidence does not refute the Custodian's certification that no minutes responsive to the Complainant's OPRA request at issue herein 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 certified in the SOI that no records responsive to the complainant's request existed. The complainant submitted no evidence to refute the custodian's certification in this regard. The GRC determined that, because the custodian certified that no records responsive to the request existed and no evidence existed in the record to refute the custodian's certification, there was no unlawful denial of access to the requested records.

Here, the Custodian certified in the SOI that no executive session minutes for the UCBOE's March 29, 2001 caucus meeting existed and the Complainant failed to submit any evidence to refute the Custodian's certification. Thus, the Custodian did not unlawfully deny access to the requested minutes pursuant to Pusterhofer.

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

OPRA states that:

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

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

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

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

Stonack, 141 N.J. 101, 124 (1995)); the Custodian's actions must have had a positive element of conscious wrongdoing (Berg v. Reaction Motors Div., 37 N.J. 396, 414 (1962)); the Custodian's actions must have been forbidden with actual, not imputed, knowledge that the actions were forbidden (Berg); the Custodian's actions must have been intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional (ECES v. Salmon, 295 N.J. Super. 86, 107 (App. Div. 1996)).

Although the Custodian's response to the Complainant's OPRA request was insufficient pursuant to N.J.S.A. 47:1A-5 and Caggiano, the Custodian did not unlawfully deny access to the requested records because same do not exist. Pusterhofer. 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 insufficient response does 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. Although the Custodian responded to the Complainant's OPRA request in writing in a timely manner, his response to the Complainant's OPRA request was insufficient pursuant to N.J.S.A. 47:1A-5.g. and Caggiano v. Borough of Stanhope (Sussex), GRC Complaint No. 2005-211 (January 2006) because his response that the Complainant was previously provided with all responsive records failed to contain a lawful basis for denying access to said OPRA request.
2. The Custodian certified in the Statement of Information that no executive session minutes for the Union City Board of Education's March 29, 2001 caucus meeting existed and the Complainant failed to submit any evidence to refute the Custodian's certification. Thus, the Custodian did not unlawfully deny access to the requested minutes pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).
3. Although the Custodian's response to the Complainant's OPRA request was insufficient pursuant to N.J.S.A. 47:1A-5 and Caggiano v. Borough of Stanhope (Sussex), GRC Complaint No. 2005-211 (January 2006), the Custodian did not unlawfully deny access to the requested records because same do not exist. Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005). 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 insufficient response does 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: Frank F. Caruso
Senior Case Manager

Approved By: Karyn Gordon, Esq.
Acting Executive Director

July 24, 2012