



**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**

**August 27, 2013 Government Records Council Meeting**

Lawrence Simons  
Complainant

Complaint No. 2012-216

v.

Lakewood Board of Education (Ocean)  
Custodian of Record

At the August 27, 2013 public meeting, the Government Records Council (“Council”) considered the August 20, 2013 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council, by a majority vote, adopted the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian complied with the Council’s July 23, 2013 Interim Order because he provided the Complainant with the responsive letter and submitted certified confirmation of compliance to the Executive Director within the extended time frame to comply.
2. The original Custodian unlawfully denied access to the responsive letter. However, the evidence of record does not indicate that the original Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the original Custodian’s unlawful denial of access 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 27th Day of August, 2013

Robin Berg Tabakin, Esq., Chair  
Government Records Council

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

Steven Ritardi, Esq., Secretary  
Government Records Council

**Decision Distribution Date: August 29, 2013**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director  
August 27, 2013 Council Meeting**

**Lawrence Simons<sup>1</sup>  
Complainant**

**GRC Complaint No. 2012-216**

v.

**Lakewood Board of Education (Ocean)<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** Hardcopies via pickup of sixteen (16) items invoiced in Invoice Nos. 471 and 473 for work conducted by Michael Inzelbuch, Esq., or members of his firm pertaining to “Testing Scandal.”

**Custodian of Record:** Thomas D’Ambola<sup>3</sup>  
**Request Received by Custodian:** May 14, 2012  
**Response Made by Custodian:** May 30, 2012  
**GRC Complaint Received:** July 20, 2012

**Background**

July 23, 2013 Council Meeting:

At its July 23, 2013 public meeting, the Council considered the July 16, 2013 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council, by a majority vote, adopted said findings and recommendations. The Council, therefore, found that:

1. The original Custodian may have failed to bear her burden of proving a lawful denial of access to the May 16, 2011 correspondence identified in Invoice No. 471. The Custodian must either disclose the responsive letter, with redactions if necessary, provide the Council with a lawful basis for denying the responsive record, or certify if the letter does not exist.
2. **The Custodian shall comply with item No. 1 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**

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

<sup>2</sup> Represented by James Eric Andrews, Esq., of Schenck, Price, Smith & King, LLP (Florham Park, NJ).

<sup>3</sup> The original custodian of record was Ms. Lydia Silva. The custodian at the time of the filing of this complaint was Ms. Arlene Biesiada.

**redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,<sup>4</sup> to the Executive Director.<sup>5</sup>**

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

#### Procedural History:

On July 24, 2013, the Council distributed its Interim Order to all parties. On July 31, 2013, the Custodian's Counsel sought an extension of time until August 7, 2013, to comply with the Council's Order, which the GRC granted on the same day. On August 7, 2013, the Custodian responded to the Council's Interim Order. The Custodian certifies that he was not the custodian of record at the time of the Complainant's OPRA request; however, he has attached the May 16, 2011 letter with a redaction pursuant to N.J.S.A. 47:1A-10.<sup>6</sup>

#### Analysis

##### Compliance

On July 23, 2013, the Council ordered the Custodian to disclose a May 16, 2011 letter to the Complainant and further to provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director. On July 24, 2013, the Council distributed its Interim Order to all parties, providing the Custodian five (5) business days to comply with the terms of said Order. On August 7, 2013, within the extended time frame to respond, the Custodian responded simultaneously providing the Complainant and GRC with the letter and certified confirmation of compliance.

Therefore, the Custodian complied with the Council's July 23, 2013 Interim Order because he provided the Complainant with the responsive letter and submitted certified confirmation of compliance to the Executive Director within the extended time frame to comply.

##### Knowing & Willful

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

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<sup>4</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>5</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.

<sup>6</sup> The Complainant was simultaneously copied on the Custodian's certified confirmation of compliance.

access under the totality of the circumstances. Specifically OPRA states "... [i]f 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)).

The original Custodian unlawfully denied access to the responsive letter. However, the evidence of record does not indicate that the original Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the original Custodian's unlawful denial of access 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. The Custodian complied with the Council's July 23, 2013 Interim Order because he provided the Complainant with the responsive letter and submitted certified confirmation of compliance to the Executive Director within the extended time frame to comply.
2. The original Custodian unlawfully denied access to the responsive letter. However, the evidence of record does not indicate that the original Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the original Custodian's unlawful denial of access 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: Brandon D. Minde, Esq.  
Executive Director

August 20, 2013



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

INTERIM ORDER

July 23, 2013 Government Records Council Meeting

Lawrence Simons  
Complainant

Complaint No. 2012-216

v.

Lakewood Board of Education (Ocean)  
Custodian of Record

At the July 23, 2013 public meeting, the Government Records Council ("Council") considered the July 16, 2013 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council, by a majority vote, adopted the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The original Custodian may have failed to bear her burden of proving a lawful denial of access to the May 16, 2011 correspondence identified in Invoice No. 471. The Custodian must either disclose the responsive letter, with redactions if necessary, provide the Council with a lawful basis for denying the responsive record, or certify if the letter does not exist.
2. **The Custodian shall comply with item No. 1 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>**
3. The Council defers analysis of whether the original Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the current Custodian's compliance with the Council's Interim Order.

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<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 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.

Interim Order Rendered by the  
Government Records Council  
On The 23rd Day of July, 2013

Robin Berg Tabakin, Esq., Chair  
Government Records Council

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

Steven Ritardi, Esq., Secretary  
Government Records Council

**Decision Distribution Date: July 24, 2013**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
July 23, 2013 Council Meeting**

**Lawrence Simons<sup>1</sup>  
Complainant**

**GRC Complaint No. 2012-216**

v.

**Lakewood Board of Education (Ocean)<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:** Hardcopies via pickup of sixteen (16) items invoiced in Invoice Nos. 471 and 473 for work conducted by Michael Inzelbuch, Esq., or members of his firm pertaining to “Testing Scandal.”

**Request Made:** May 14, 2012

**Response Made:** May 30, 2012

**GRC Complaint Filed:** July 20, 2012<sup>3</sup>

**Background<sup>4</sup>**

**Request and Response:**

On May 14, 2012, the Complainant submitted an Open Public Records Act (“OPRA”) request seeking the above-listed records. On May 30, 2012, the eleventh (11<sup>th</sup>) business day following receipt of said request, the original Custodian responded in writing stating that Invoice Nos. 471 and 473, provided to the Complainant on March 30, 2012 in response to an earlier OPRA request, are complete and accurate copies of the invoices submitted to the Lakewood Board of Education (“Board”) by Mr. Inzelbuch. The Custodian further stated that she attached copies of these invoices for the Complainant’s convenience. The Custodian stated that no further records regarding the invoices are in the Board’s possession.

**Denial of Access Complaint:**

On July 20, 2012, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant disputes the Custodian’s response that no further records regarding the invoices exist. The Complainant asserts that the Board amassed

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

<sup>2</sup> Arlene Biesiada, Custodian of Records. Represented by James Eric Andrews, Esq., of Schenck, Price, Smith & King, LLP (Florham Park, NJ). The original custodian of record was Ms. Lydia Silva.

<sup>3</sup> The GRC received the Denial of Access Complaint on said date.

<sup>4</sup> The parties may have submitted additional correspondence or made additional statements/assertions in the submissions identified herein. However, the Council includes in the Findings and Recommendations of the Executive Director the submissions necessary and relevant for the adjudication of this complaint.



over \$380,000 in legal fees related to a testing scandal. The Complainant contends that paying bills without having supporting documentation he is currently seeking can lead to fraud.

#### Statement of Information:

On October 9, 2012, the Custodian filed a Statement of Information (“SOI”).<sup>5</sup> The Custodian certifies that the search conducted involved reviewing all invoices from Mr. Inzelbuch and identifying those responsive to the Complainant’s OPRA request. The Custodian certifies that the original Custodian responded to the Complainant’s OPRA request on May 30, 2012 advising that no records other than Invoice Nos. 471 and 473 exist. The Custodian certifies that the original Custodian also attached copies of these invoices to her response letter.

The Custodian certifies that the Complainant was provided with all responsive records and that no other records exist. The Custodian asserts that the Complainant appears to believe that additional invoices exist that further break down the billing entries contained in Invoice Nos. 471 and 473. The Custodian certifies that there are no such records. The Custodian further contends that the original Custodian was not required to create records in order to respond to the Complainant’s OPRA request. MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005). The Custodian argues that to the extent that the Complainant’s OPRA request required the Custodian to compile specific reports of how legal fees were accumulated (phone calls, meetings, etc.) no such reports exist and the Custodian was under no obligation to create reports. Shanley v. City of Wildwood (Cape May), GRC Complaint No. 2009-58 (June 2009) and Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).

### Analysis<sup>6</sup>

#### Unlawful Denial of Access

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, the Complainant disputed the original Custodian’s response that no additional records existed. The Complainant stated that given the amount of money spent on the BOE’s “testing scandal,” he could not believe that the BOE maintained no documentation to support the charges levied by Mr. Inzelbuch. The current Custodian certified in the SOI that no records exist and further argued that the original Custodian was not required to create a record supporting how Mr. Inzelbuch’s legal fees were accumulated.

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<sup>5</sup> The Custodian advised the GRC on October 2, 2012 that the original Custodian no longer worked for the Board.

<sup>6</sup> There may be other OPRA issues in this matter; however, the Council’s analysis is based solely on the claims made in the Complainant’s Denial of Access Complaint.

The GRC has reviewed Invoice Nos. 471 and 473 and confirms that the invoices do not refer to any records other than the May 16, 2011 entry addressed below. The entries refer to consultations, discussions and meetings but do not indicate that any documentation exists. The Custodian correctly argued that the original Custodian was not required to create reports to satisfy the Complainant's OPRA request. MAG, *supra*. However, the May 16, 2011 entry on Invoice No. 471 identifies a specific record: "correspondence from A. O'Driscoll, Esq. Re: ... testing scandal." This record appears to be the type of record sought by the Complainant and should have been provided in response to the Complainant's OPRA request unless it is exempt under OPRA.

Therefore, the original Custodian may have failed to bear her burden of proving a lawful denial of access to the May 16, 2011 correspondence identified in Invoice No. 471. The Custodian must either disclose the responsive letter, with redactions if necessary, provide the Council with a lawful basis for denying the responsive record, or certify if the letter does not exist.

### **Knowing & Willful**

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

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. The original Custodian may have failed to bear her burden of proving a lawful denial of access to the May 16, 2011 correspondence identified in Invoice No. 471. The Custodian must either disclose the responsive letter, with redactions if necessary, provide the Council with a lawful basis for denying the responsive record, or certify if the letter does not exist.
2. **The Custodian shall comply with item No. 1 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>7</sup> to the Executive Director.<sup>8</sup>**
3. The Council defers analysis of whether the original Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the

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<sup>7</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>8</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.

circumstances pending the current Custodian's compliance with the Council's Interim Order.

Prepared By: Frank F. Caruso  
Senior Case Manager

Approved By: Brandon D. Minde, Esq.  
Executive Director

July 16, 2013