



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

October 29, 2013 Government Records Council Meeting

Linda Figueroa
Complainant

Complaint No. 2012-266

v.

Nutley Board of Education (Essex)
Custodian of Record

At the October 29, 2013 public meeting, the Government Records Council (“Council”) considered the October 22, 2013 Supplemental 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 certified in a timely manner that she disclosed to the Complainant by regular and certified mail all tort claim notices in the District’s possession dating back twenty years from the date of request, and although she provided certified confirmation of compliance to the GRC in a timely manner, her September 26, 2013 certified confirmation of compliance was defective because she did not in fact disclose to the Complainant a copy of the notice of tort claim previously filed by the Complainant within five (5) business days as required by the terms of the September 24, 2013 Interim Order.
2. The Custodian’s failure to respond in writing within the extended time frame resulted in a “deemed” denial. N.J.S.A. 47:1A-5(g) and 5(i). Furthermore, the Custodian’s written response was legally insufficient and the Custodian failed to bear her burden of proving that the denial of access to the notice of tort claims submitted to the Board for injuries suffered/sustained on school property within the past two decades was authorized by law. N.J.S.A. 47:1A-6. Moreover, the Custodian failed to fully comply with the Council’s September 24, 2013 Interim Order in a timely manner. However, the Custodian did submit to the GRC an amended certification, thereby curing the deficiency and complying with the terms of the Interim Order. Additionally, the evidence of record does not indicate that the Custodian’s actions had a positive element of conscious wrongdoing or were intentional and deliberate. Therefore, the Custodian’s actions did 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 29th Day of October, 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: November 1, 2013

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
October 29, 2013 Council Meeting**

**Linda Figueroa¹
Complainant**

GRC Complaint No. 2012-266

v.

**Nutley Board of Education (Essex)²
Custodial Agency**

Records Relevant to Complaint:

Request dated August 7, 2012: A copy of all incident/accident/injury report(s) involving Ava Harabedian during the 2008 to August 2012 school years at Radcliffe School.

Request dated August 27, 2012: Any/all notice of tort claims submitted to the Nutley Board of Education ("Board") for injuries suffered/sustained on school property within the Nutley School District over the past 20 years.

Request dated August 27, 2012: Copies of all scooter board purchase orders (or other proof of purchase) for the past 20 years.

Request dated September 11, 2012: Copies of all correspondence between Maria Perna, Esq. and Frank Pomaco, Esq. regarding the scooter board incident at Radcliffe School between Ian Brown and Ava Harabedian.

Custodian of Records: Karen Yeamans

Requests Received by Custodian:

The August 7, 2012 request was received on August 21, 2012.

The August 27, 2012 requests were received on August 27, 2012.

The September 11, 2012 request was received on September 11, 2012.³

Responses Made by Custodian:

No response was made to the August 7, 2012 request.

A September 5, 2012 response was made to the August 27, 2012 requests.

A September 18, 2012 response was made to the September 11, 2012 request.⁴

GRC Complaint Received: September 18, 2012

¹ No legal representation listed on record.

² Represented by Gaccione Pomaco, Esq. (Belleville, NJ).

³ The Custodian certified that she received the September 11, 2012 request on August 27, 2012. This is clearly incorrect. The evidence of record reveals the Complainant e-mailed the request to the Custodian on September 11, 2012.

⁴ The evidence of record reveals that the Complainant had not received this response as of the time she filed the complaint because the Complainant stated in the complaint that no response was made to her September 11, 2012 request. Subsequently, the Complainant in her response to the Custodian's SOI acknowledged that she received the Custodian's September 18, 2012 response, but only after she had filed the complaint.

Background⁵

At its September 24, 2013 public meeting, the Government Records Council (“Council”) considered the September 17, 2013 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. The Custodian did not bear her burden of proof that she timely responded to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian’s failure to respond in writing to the Complainant’s OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).
2. The Custodian’s written response was legally insufficient because the Custodian failed to respond to each item contained in the Complainant’s OPRA requests and failed to provide a date certain upon which she would respond to the Complainant providing any responsive records. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). See also Paff v. Willingboro Board of Education (Burlington), GRC Complaint No. 2007-272 (May 2008), and Hardwick v. NJ Department of Transportation, GRC Complaint No. 2007-164 (February 2008).
3. Notwithstanding the Custodian’s “deemed” denial, she did not unlawfully deny access to the records responsive to the Complainant’s request dated August 7, 2012 and August 27, 2012, which was for a copy of all accident reports involving Ava Harabedian, and a copy of all scooter board purchase records, respectively, because the Custodian certified that the records are nonexistent and the Complainant failed to submit any competent, credible evidence to refute the Custodian’s certification. See Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).
4. The Custodian failed to bear her burden of proving a lawful denial of access to copies of all tort claim notices during the twenty year period preceding date of request, which are the records responsive to the request; therefore, the Custodian must disclose said records to the Complainant. N.J.S.A. 47:1A-6. See also O’Shea v. Township of West Milford, GRC Complaint No. 2004-87 (September 2005).
5. **The Custodian shall comply with paragraph #4 above within five (5) business days from receipt of the Council’s Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director.**

⁵ The 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.

6. As to the September 11, 2012 OPRA request, the Complainant filed the Denial of Access Complaint before the statutorily-mandated time allowed for the Custodian to respond to the Complainant's OPRA request had expired, and the evidence of record reveals that the Custodian had not responded to the request denying access to the requested record prior to the complaint being filed. Moreover, the requested records are not immediate access records pursuant to N.J.S.A. 47:1A-5(e). As such, the Complainant's allegation that the Custodian failed to respond to the September 11, 2012 OPRA request is unripe and this allegation is defective and should be dismissed. N.J.S.A. 47:1A-5(i).
7. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Procedural History:

On September 25, 2013, the Council distributed its September 24, 2013 Interim Order to all parties. On September 26, 2013, the first (1st) business day following receipt of the Council's Interim Order, the Custodian sent certified confirmation of compliance to the GRC wherein the Custodian stated that on September 25, 2013, she disclosed to the Complainant by regular and certified mail all tort claim notices in the District's possession dating back twenty years from the date of request.

On September 29, 2013, the Complainant notified the GRC that the Custodian failed to disclose to her "...ALL Notice of Tort claims..." (Emphasis in original.) The Complainant states that she filed a notice of tort claim on June 21, 2012, which the Custodian failed to disclose to her. On September 30, 2013, the GRC informed the Complainant that the Custodian could not disclose what the agency did not have in its possession.

On October 8, 2013, the Custodian e-mailed the GRC to acknowledge that she did not disclose to the Complainant the copy of the notice of tort claim filed by the Complainant because the Custodian states that she assumed the Complainant was already in possession of the record. In reply to the Custodian's e-mail, the GRC notified the Custodian via e-mail dated October 8, 2013, that she would have to make the Complainant's copy of the notice of tort claim available to the Complainant and thereafter send the GRC an amending certification to correct the inaccuracy in her certified confirmation of compliance dated September 26, 2013.

On October 8, 2013, the Custodian submitted an amended certified confirmation of compliance to the GRC. The Custodian certifies that she did not previously disclose the notice of tort claim filed by the Complainant because the Custodian states that she did not understand that the Interim Order applied to a document the Custodian believed the Complainant already had in her possession. The Custodian also certifies that she disclosed said notice of tort claim to the Complainant on October 8, 2013, via personal delivery. The Custodian further certifies that she did not intentionally withhold the notice of tort claim filed by the Complainant or willfully provide incorrect information in her certified confirmation of compliance dated September 26, 2013.

Analysis

Compliance

On September 24, 2013, the Council ordered the above-referenced compliance. On September 25, 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 September 26, 2013, one (1) business day after receipt of the Interim Order, the Custodian provided certified confirmation of compliance to the GRC.

On October 8, 2013, the GRC determined that the Custodian failed to disclose to the Complainant a notice of tort claim previously filed by the Complainant. The GRC notified the Custodian that she must disclose to the Complainant a copy of said notice of tort claim and submit to the GRC an amended certification correcting the discrepancy. On October 8, 2013, the ninth (9th) business day following receipt of the Order, the Custodian did disclose to the Complainant a copy of said notice of tort claim and submitted to the GRC an amended certification.

Therefore, although the Custodian certified in a timely manner that she disclosed to the Complainant by regular and certified mail all tort claim notices in the District's possession dating back twenty years from the date of request, and although she provided certified confirmation of compliance to the GRC in a timely manner, her September 26, 2013 certified confirmation of compliance was defective because she did not in fact disclose to the Complainant a copy of the notice of tort claim previously filed by the Complainant within five (5) business days as required by the terms of the September 24, 2013 Interim Order.

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 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 Custodian's failure to respond in writing within the extended time frame resulted in a "deemed" denial. N.J.S.A. 47:1A-5(g) and 5(i). Furthermore, the Custodian's written response was legally insufficient and the Custodian failed to bear her burden of proving that the denial of access to the notice of tort claims submitted to the Board for injuries suffered/sustained on school property within the past two decades was authorized by law. N.J.S.A. 47:1A-6. Moreover, the Custodian failed to fully comply with the Council's September 24, 2013 Interim Order in a timely manner. However, the Custodian did submit to the GRC an amended certification, thereby curing the deficiency and complying with the terms of the Interim Order. Additionally, the evidence of record does not indicate that the Custodian's actions had a positive element of conscious wrongdoing or were intentional and deliberate. Therefore, the Custodian's actions did 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 certified in a timely manner that she disclosed to the Complainant by regular and certified mail all tort claim notices in the District's possession dating back twenty years from the date of request, and although she provided certified confirmation of compliance to the GRC in a timely manner, her September 26, 2013 certified confirmation of compliance was defective because she did not in fact disclose to the Complainant a copy of the notice of tort claim previously filed by the Complainant within five (5) business days as required by the terms of the September 24, 2013 Interim Order.
2. The Custodian's failure to respond in writing within the extended time frame resulted in a "deemed" denial. N.J.S.A. 47:1A-5(g) and 5(i). Furthermore, the Custodian's written response was legally insufficient and the Custodian failed to bear her burden of proving that the denial of access to the notice of tort claims submitted to the Board for injuries suffered/sustained on school property within the past two decades was authorized by law. N.J.S.A. 47:1A-6. Moreover, the Custodian failed to fully comply with the Council's September 24, 2013 Interim Order in a timely manner. However, the Custodian did submit to the GRC an amended certification, thereby curing the deficiency and complying with the terms of the Interim Order. Additionally, the evidence of record does not indicate that the Custodian's actions had a positive element of conscious wrongdoing or were intentional and deliberate. Therefore, the Custodian's actions did not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Prepared By: John E. Stewart, Esq.
October 22, 2013

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



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

September 24, 2013 Government Records Council Meeting

Linda Figueroa
Complainant

Complaint No. 2012-266

v.

Nutley Board of Education (Essex)
Custodian of Record

At the September 24, 2013 public meeting, the Government Records Council (“Council”) considered the September 17, 2013 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. The Custodian did not bear her burden of proof that she timely responded to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian’s failure to respond in writing to the Complainant’s OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).
2. The Custodian’s written response was legally insufficient because the Custodian failed to respond to each item contained in the Complainant’s OPRA requests and failed to provide a date certain upon which she would respond to the Complainant providing any responsive records. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). See also Paff v. Willingboro Board of Education (Burlington), GRC Complaint No. 2007-272 (May 2008), and Hardwick v. NJ Department of Transportation, GRC Complaint No. 2007-164 (February 2008).
3. Notwithstanding the Custodian’s “deemed” denial, she did not unlawfully deny access to the records responsive to the Complainant’s request dated August 7, 2012 and August 27, 2012, which was for a copy of all accident reports involving Ava Harabedian, and a copy of all scooter board purchase records, respectively, because the Custodian certified that the records are nonexistent and the Complainant failed to submit any competent, credible evidence to refute the Custodian’s certification. See Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).
4. The Custodian failed to bear her burden of proving a lawful denial of access to copies of all tort claim notices during the twenty year period preceding date of request, which are the records responsive to the request; therefore, the Custodian must disclose said records



to the Complainant. N.J.S.A. 47:1A-6. See also O'Shea v. Township of West Milford, GRC Complaint No. 2004-87 (September 2005).

5. **The Custodian shall comply with paragraph #4 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 1:4-4,¹ to the Executive Director.²**
6. As to the September 11, 2012 OPRA request, the Complainant filed the Denial of Access Complaint before the statutorily-mandated time allowed for the Custodian to respond to the Complainant's OPRA request had expired, and the evidence of record reveals that the Custodian had not responded to the request denying access to the requested record prior to the complaint being filed. Moreover, the requested records are not immediate access records pursuant to N.J.S.A. 47:1A-5(e). As such, the Complainant's allegation that the Custodian failed to respond to the September 11, 2012 OPRA request is unripe and this allegation is defective and should be dismissed. N.J.S.A. 47:1A-5(i).
7. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Interim Order Rendered by the
Government Records Council
On The 24th Day of September, 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: September 25, 2013

¹ "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."

² 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.

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
September 24, 2013 Council Meeting**

**Linda Figueroa¹
Complainant**

GRC Complaint No. 2012-266

v.

**Nutley Board of Education (Essex)²
Custodial Agency**

Records Relevant to Complaint:

Request dated August 7, 2012: A copy of all incident/accident/injury report(s) involving Ava Harabedian during the 2008 to August 2012 school years at Radcliffe School.

Request dated August 27, 2012: Any/all notice of tort claims submitted to the Nutley Board of Education (“Board”) for injuries suffered/sustained on school property within the Nutley School District over the past 20 years.

Request dated August 27, 2012: Copies of all scooter board purchase orders (or other proof of purchase) for the past 20 years.

Request dated September 11, 2012: Copies of all correspondence between Maria Perna, Esq. and Frank Pomaco, Esq. regarding the scooter board incident at Radcliffe School between Ian Brown and Ava Harabedian.

Custodian of Records: Karen Yeamans

Requests Received by Custodian:

The August 7, 2012 request was received on August 21, 2012.

The August 27, 2012 requests were received on August 27, 2012.

The September 11, 2012 request was received on September 11, 2012.³

Responses Made by Custodian:

No response was made to the August 7, 2012 request.

A September 5, 2012 response was made to the August 27, 2012 requests.

A September 18, 2012 response was made to the September 11, 2012 request.⁴

¹ No legal representation listed on record.

² Represented by Gaccione Pomaco, Esq. (Belleville, NJ).

³ The Custodian certified that she received the September 11, 2012 request on August 27, 2012. This is clearly incorrect. The evidence of record reveals the Complainant e-mailed the request to the Custodian on September 11, 2012.

⁴ The evidence of record reveals that the Complainant had not received this response as of the time she filed the complaint because the Complainant stated in the complaint that no response was made to her September 11, 2012

GRC Complaint Received: September 18, 2012

Background⁵

Requests and Responses:

On August 7, 2012, the Complainant submitted an Open Public Records Act (“OPRA”) request seeking the above-listed records. The evidence of record reveals that the Custodian did not respond to the request; however, the Custodian subsequently certified that all student accident reports were provided to the Complainant on August 7, 2012 and August 21, 2012.

On August 27, 2012, the Complainant submitted two (2) OPRA requests seeking the above-listed records. On September 5, 2012, the sixth (6th) business day following receipt of said requests, the Custodian responded in writing to inform the Complainant that she had spoken with the Board’s attorney and will address the Complainant’s requests the following week.

On September 11, 2012, the Complainant submitted an OPRA request seeking the above-listed records. The Custodian subsequently certified that she responded via e-mail to the request on September 18, 2012, the fifth (5th) business day following receipt of said request. The Custodian certified that the Complainant requested correspondence from two named attorneys and that she informed the Complainant to request said correspondence directly from the attorneys.

Denial of Access Complaint:

On September 18, 2012, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant states that she filed four (4) OPRA requests and that two (2) of the requests received a “please wait” response and the other two (2) requests received no response.⁶ The Complainant states that her OPRA requests were ignored and unfulfilled within the statutorily-mandated period for a response. The Complainant states that she received an e-mail from the Custodian on September 11, 2012, wherein the Custodian informed her that she would tend to all of the Complainant’s requests by September 14, 2012. The Complainant states that she e-mailed the Custodian on September 14, 2012 and September 17, 2012, to determine the status of her requests but the Custodian never replied.

request. Subsequently, the Complainant in her response to the Custodian’s SOI acknowledged that she received the Custodian’s September 18, 2012 response, but only after she had filed the complaint.

⁵ 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.

⁶ The Complainant did not provide the specific dates of the requests or the dates of the responses, but the Complainant did attach to her complaint the four (4) OPRA requests as well as an e-mailed response to two (2) of the requests, so the GRC was able to match the responses to the requests to determine which requests did not receive a response.

Statement of Information:

On October 22, 2012, the Custodian filed a Statement of Information (“SOI”). The Custodian certifies that she received the Complainant’s August 7, 2012 request on August 21, 2012. The Custodian further certifies that she received the remainder of the Complainant’s requests on August 27, 2012.

The Custodian certifies that the records responsive to the August 7, 2012 request were “all student accident reports for 12 years.” The Custodian certifies that all accident reports for school years 2009-2010, 2010-2011 and 2011-2012 were provided to the Complainant on August 7, 2012. The Custodian also certifies that accident reports from 2002 through 2009 were provided to the Complainant on August 21, 2012.

The Custodian certifies that the records responsive to the first August 27, 2012 request were “Tort Claims” and the records responsive to the second August 27, 2012 request were “purchase orders for scooters for past 20 years.” The Custodian certifies that no records regarding tort claims have been supplied because twenty years of data is difficult to retrieve. The Custodian further certifies that the Board does not have any purchase orders for scooter boards.⁷

The Custodian certifies that the records responsive to the September 11, 2012 request were “corresponndce (sic) from attorneys.” The Custodian certifies that she informed the Complainant via e-mail on September 18, 2012, that her request for these records should be made directly to the attorneys because the Board does not maintain the attorney files.⁸

Additional Information:

On October 23, 2012, the Complainant submitted a response to the SOI, wherein she informed the GRC that she did receive student accident reports in response to her request, but she did not receive the specific accident report she requested. The Complainant states that the Custodian is well aware of the fact she did not disclose the requested accident report. The Complainant also states that she finds it hard to believe that the Custodian could not locate any tort claim notices in a two month period.⁹ Finally, the Complainant states that the Custodian’s response to her September 11, 2012 OPRA request was made after the Complainant filed the complaint.

On October 24, 2012, the Complainant e-mailed the GRC to state that she did not receive the accident report involving Ava Harabedian and Ian Brown which occurred in the gym and resulted in head trauma to one of the children. The Complainant also questions why she was told by the Custodian that she must obtain correspondence between attorneys Maria Perna and Frank Pomaco directly from the attorneys. The Complainant states that Mr. Pomaco is the Board’s

⁷ The Custodian stated that no Board member could remember when such items were purchased.

⁸ The September 18, 2012 e-mailed response was not attached to the SOI.

⁹ The Complainant is referring to the period of time from the Custodian’s receipt of the OPRA request until the submission of the SOI.

counsel and that the Custodian should obtain the records from the attorney and disclose same to her.

On October 24, 2012, the Custodian e-mailed the GRC stating that she granted the Complainant access to every accident report on file for the past ten years and that no accident reports were withheld.

On August 28, 2013, in response to a GRC request, the Custodian submitted a certification in which she stated that she provided all student accident reports to the Complainant and that the Board does not have the specific record requested by the Complainant.

Analysis¹⁰

Timeliness

OPRA mandates that a custodian must either grant or deny access to requested records within seven (7) business days from receipt of said request. N.J.S.A. 47:1A-5(i). A custodian's failure to respond within the required seven (7) business days results in a "deemed" denial. *Id.* Further, a custodian's response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5(g).¹¹ Thus, a custodian's failure to respond in writing to a complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).

The Complainant asserts that on August 7, 2012, she submitted an official OPRA request form to the Custodian requesting a copy of all incident/accident/injury reports involving Ava Harabedian from the 2008 to 2011-2012 school years. There is nothing in the evidence of record to indicate that a written request was made by the Custodian in a timely manner granting access, denying access, seeking clarification or requesting an extension of time. The Complainant states that the Custodian "ignored" her August 7, 2012 request. The Custodian did not certify that she responded in writing to the request; however, she did certify that all student accident reports from 2002 to 2012 were provided to the Complainant on August 7 and August 21, 2012.

Therefore, the Custodian did not bear her burden of proof that she timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley, supra.

¹⁰ 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.

¹¹ It is the GRC's position that a custodian's written response either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, even if said response is not on the agency's official OPRA request form, is a valid response pursuant to OPRA.

Sufficiency of Response

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 Paff v. Willingboro Board of Education (Burlington), GRC Complaint No. 2007-272 (May 2008), the Council held that "...[t]he Custodian's response was legally insufficient because he failed to respond to each request item individually. Therefore, the Custodian has violated N.J.S.A. 47:1A-5.g." Moreover, in Hardwick v. NJ Department of Transportation, GRC Complaint No. 2007-164 (February 2008), the custodian responded by requesting an extension of time to address the request but failed to provide a date certain upon which the requested records would be provided. The Council held that the custodian's request for an extension of time was inadequate under OPRA pursuant to N.J.S.A. 47:1A-5(i).

Here, the Custodian responded in writing to the Complainant's two August 27, 2012 OPRA requests on September 5, 2012, the sixth (6th) business day following receipt of said requests; however, the Custodian failed to respond to each request item individually. Furthermore, the Custodian failed to provide a date certain upon which she would respond to the Complainant providing any responsive records. The Custodian merely stated, "I...will have your responses next week."

As such, the Custodian's written response was legally insufficient because the Custodian failed to respond to each item contained in the Complainant's OPRA requests and failed to provide a date certain upon which she would respond to the Complainant providing any responsive records. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). See also Paff, *supra*, and Hardwick, *supra*.

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.

Request dated August 7, 2012 - a copy of all incident/accident/injury report(s) involving Ava Harabedian during the 2008 to August 2012 school years at Radcliffe School.

Request dated August 27, 2012 - copies of all scooter board purchase orders (or other proof of purchase) for the past 20 years.

In Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005), the custodian certified that no records responsive to the complainant's request for billing records existed and the complainant submitted no evidence to refute the custodian's certification regarding said records. 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 she provided to the Complainant all student accident reports for school years 2009-2010, 2010-2011 and 2011-2012 on August 7, 2012. The Custodian further certified that she provided accident reports from 2002 through 2009 to the Complainant on August 21, 2012. The Complainant responded to the SOI on October 23 and October 24, 2012, emphasizing that she was seeking a specific accident report involving a named student. On October 24, 2012, the Custodian replied by asserting that every accident report on file for the past ten years was disclosed to the Complainant and that no accident reports were withheld. Moreover, the Custodian submitted a certification dated August 28, 2013, wherein she stated the Board does not have the specific student accident report requested by the Complainant.

The Custodian also certified that there are no records responsive to the Complainant's August 27, 2012 request for copies of all purchase orders or other proof of purchase for scooter boards during the twenty (20) year period preceding the request.

Therefore, notwithstanding the Custodian's "deemed" denial, she did not unlawfully deny access to the records responsive to the Complainant's requests dated August 7, 2012 and August 27, 2012, which was for a copy of all accident reports involving Ava Harabedian, and a copy of all purchase records for scooter boards, respectively. The Custodian certified that the records are nonexistent and the Complainant failed to submit any competent, credible evidence to refute the Custodian's certification. *See Pusterhofer, supra.*

Request dated August 27, 2012 - all notices of tort claims submitted to the Board for injuries suffered/sustained on school property within the Nutley School District over the past 20 years.

The Custodian, after identifying the records responsive to the request, certified that "[n]o records have been supplied as 20 years of data is difficult to retrieve." The Custodian did not contend that the request was overly broad or was otherwise invalid. The Complainant took exception to the Custodian's reason for not disclosing the requested records because she stated that two (2) months had lapsed since the request was provided to the Custodian. A notice of tort claim is a government record subject to disclosure. *See O'Shea v. Township of West Milford, GRC Complaint No. 2004-87 (September 2005).*

Accordingly, the Custodian failed to bear her burden of proving a lawful denial of access to copies of all tort claim notices during the twenty year period preceding date of request, which are the records responsive to the request; therefore, the Custodian must disclose said records to the Complainant. N.J.S.A. 47:1A-6. *See also O'Shea, supra.*

Request dated September 11, 2012 - copies of all correspondence between Maria Perna, Esq. and Frank Pomaco, Esq. regarding the scooter board incident at Radcliffe School between Ian Brown and Ava Harabedian.

"Unless a shorter time period is otherwise provided by statute, regulation, or executive order, a custodian of a government record shall grant access to a government record...as soon as possible, but not later than seven business days after receiving the request, provided that the record is currently available and not in storage or archived."

N.J.S.A. 47:1A-5(i).

The Custodian certified that she responded to the Complainant's September 11, 2012 request on September 18, 2012, the fifth (5th) business day following receipt of said request, informing the Complainant that the request should be made directly to the attorneys. The Complainant stated in the Denial of Access Complaint filed on September 18, 2012, that the Custodian failed to respond to the September 11, 2012 request. Subsequently, the Complainant acknowledged that she received the Custodian's September 18, 2012 response, but only after she had filed the complaint.

Here, the evidence of record reveals that the Complainant filed the complaint on September 18, 2012, alleging *inter alia* that the Custodian failed to respond to her September 11, 2012 request before the Custodian's time for responding to the request had expired. The evidence of record further indicates that the Custodian, sometime after the complaint was filed on September 18, 2012, responded to the Complainant's September 11, 2012 request.

Accordingly, the Complainant filed the Denial of Access Complaint before the statutorily-mandated time allowed for the Custodian to respond to the Complainant's OPRA request had expired, and the evidence of record reveals that the Custodian had not responded to the request denying access to the requested record prior to the complaint being filed. Moreover, the requested records are not immediate access records pursuant to N.J.S.A. 47:1A-5(e). As such, the Complainant's allegation that the Custodian failed to respond to the September 11, 2012 OPRA request is unripe and this allegation is defective and should be dismissed. N.J.S.A. 47:1A-5(i).

Knowing & Willful

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

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian did not bear her burden of proof that she timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).
2. The Custodian's written response was legally insufficient because the Custodian failed to respond to each item contained in the Complainant's OPRA requests and failed to provide a date certain upon which she would respond to the Complainant providing any

responsive records. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). See also Paff v. Willingboro Board of Education (Burlington), GRC Complaint No. 2007-272 (May 2008), and Hardwick v. NJ Department of Transportation, GRC Complaint No. 2007-164 (February 2008).

3. Notwithstanding the Custodian's "deemed" denial, she did not unlawfully deny access to the records responsive to the Complainant's request dated August 7, 2012 and August 27, 2012, which was for a copy of all accident reports involving Ava Harabedian, and a copy of all scooter board purchase records, respectively, because the Custodian certified that the records are nonexistent and the Complainant failed to submit any competent, credible evidence to refute the Custodian's certification. See Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).
4. The Custodian failed to bear her burden of proving a lawful denial of access to copies of all tort claim notices during the twenty year period preceding date of request, which are the records responsive to the request; therefore, the Custodian must disclose said records to the Complainant. N.J.S.A. 47:1A-6. See also O'Shea v. Township of West Milford, GRC Complaint No. 2004-87 (September 2005).
5. **The Custodian shall comply with paragraph #4 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 1:4-4,¹² to the Executive Director.¹³**
6. As to the September 11, 2012 OPRA request, the Complainant filed the Denial of Access Complaint before the statutorily-mandated time allowed for the Custodian to respond to the Complainant's OPRA request had expired, and the evidence of record reveals that the Custodian had not responded to the request denying access to the requested record prior to the complaint being filed. Moreover, the requested records are not immediate access records pursuant to N.J.S.A. 47:1A-5(e). As such, the Complainant's allegation that the Custodian failed to respond to the September 11, 2012 OPRA request is unripe and this allegation is defective and should be dismissed. N.J.S.A. 47:1A-5(i).
7. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Prepared By: John E. Stewart, Esq.

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

September 17, 2013

¹² "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."

¹³ 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.