



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
101 SOUTH BROAD STREET
PO Box 819
TRENTON, NJ 08625-0819

PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

June 26, 2018 Government Records Council Meeting

Christina Moreira
Complainant

Complaint No. 2015-313

v.

Elizabeth Board of Education (Union)
Custodian of Record

At the June 26, 2018 public meeting, the Government Records Council (“Council”) considered the June 19, 2018 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. The Custodian complied with the Council’s April 24, 2018 Interim Order. Specifically, the Custodian responded in the extended time frame disclosing records in accordance with conclusion No. 3 and 4 of the Council’s Order. Further, the Custodian simultaneously provided certified confirmation of compliance to the Council Staff.
2. The Custodian unlawfully denied access to the Complainant’s September 16, 2015 OPRA request No. 1, item Nos. 2 and 3, in part. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-6. Further, the Custodian unlawfully denied access to the Complainant’s September 16, 2015 OPRA request No. 2, item No. 4. However, the Complainant’s September 16, 2015 request No. 1, item Nos. 1, 6, 7, and 8 were invalid. Also, the Custodian bore his burden of proving that he lawfully denied access to the Complainant’s April 28, 2015 OPRA request, September 16, 2015 OPRA request No. 1, item Nos. 4 and 5, and the September 16, 2015 OPRA request No. 2, item Nos. 1, 2, and 3 because no records existed. Additionally, the evidence of record does not indicate that the Custodian’s violations of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

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



Final Decision Rendered by the
Government Records Council
On The 26th Day of June, 2018

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: June 29, 2018

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Council Staff
June 26, 2018 Council Meeting**

**Christina Moreira¹
Complainant**

GRC Complaint No. 2015-313

v.

**Elizabeth Board of Education (Union)²
Custodial Agency**

Records Relevant to Complaint:

April 28, 2015 OPRA request:³

1. Purchase orders/invoices/checks for the 2014-2015 Budget Item “Equalization Aid” for the Elizabeth Board of Education (“EBE”).
2. Purchase orders/invoices/checks for the 2014-2015 Budget Item “Categorical Special Education Aid” for the EBE.

September 16, 2015 OPRA request 1:

1. A copy of all contracts for athletic gear and/or equipment entered into by the EBE during the 2013-14 and 2014-15 school years.
2. A copy of all field trip requests from each EBE school during the 2014-15 school year.
3. A list of all approved field trips taken during the 2014-15 school year.
4. A copy of the EBE and each individual school budget for the 2014-15 school year, reflecting line items for school trips.
5. A copy of the EBE and each individual school budget for the 2014-15 school year, reflecting line items for transportation related to school trips.
6. A copy of all vendor contracts for purchase of the 3-4 page pamphlets/fliers containing “school excellence” information for the 2014-15 school year. These 3-4 page pamphlets/fliers were distributed to parents roughly four (4) times during the 2014-15 school year. A photograph has been included for identification purposes.
7. A copy of all invoices reflecting payment requests for the 3-4 page pamphlets/fliers containing “school excellence” information for the 2014-15 school year. These 3-4 page pamphlets/fliers were distributed to parents roughly four (4) times during the 2014-15 school year. A photograph has been included for identification purposes.

¹ No legal representation listed on record.

² Represented by Edward J. Kologi, Esq. of Kologi, Simitz (Linden, NJ). Previously represented by Jonathan Williams, Esq., of DeCotiis, FitzPartrick & Cole, LLP (Teaneck, NJ) and Bruce Rosen, Esq., of McCusker, Anselmi, Rosen & Carvelli, P.C. (Florham Park, NJ).

³ The Complainant sought additional records that are not at issue in this complaint.

8. A copy of all vouchers for payment of the 3-4 page pamphlets/fliers containing “school excellence” information for the 2014-15 school year. These 3-4 page pamphlets/fliers were distributed to parents roughly four (4) times during the 2014-15 school year. A photograph has been included for identification purposes.

September 16, 2015 OPRA request 2:⁴

1. Document for the job posting of Supervisor of Innovative Programming for the 2014-2015 and 2015-2016 school years for the district.
2. Résumé of Carlos Lucio, Supervisor of Innovative Programming.
3. List of candidates that applied for position of Supervisor of Innovative Programming.
4. Purchase order for the 2014-2015 school calendar for the EBE (including cost and amount of calendars ordered).

Custodian of Record: Harold E. Kennedy, Jr.

Requests Received by Custodian: April 28, 2015; September 16, 2015

Response Made by Custodian: May 7, 2015; September 28, 2015

GRC Complaint Received: October 2, 2015

Background

April 24, 2018 Council Meeting:

At its April 24, 2018 public meeting, the Council considered the December 12, 2017 Findings and Recommendations of the Council Staff 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 Complainant’s September 16, 2015 request No. 1, item Nos. 1, 6, 7, and 8, seeking certain documents pertaining to all sports equipment purchases and an unidentified brochure would have required research. The Custodian had no legal duty to research his files to locate records potentially responsive to those request items. MAG Entm’t, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005); Bent v. Stafford Police Dep’t, 381 N.J. Super. 30, 37 (App. Div. 2005); N.J. Builders Assoc. v. N.J. Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009); Inzelbuch v. Lakewood Bd. of Educ. (Ocean), GRC Complaint No. 2013-97 (Interim Order dated January 28, 2014); Carter v. Franklin Fire Dist. No. 2 (Somerset), GRC Complaint No. 2012-05 (Final Decision dated June 26, 2012).
2. The Custodian has borne his burden of proof that he lawfully denied access to the Complainant’s April 28, 2015, September 16, 2015 OPRA request No. 1, item Nos. 4 and 5, and the September 16, 2015 OPRA request No. 2, item Nos. 1, 2, and 3 based on the Custodian’s certified statements that no responsive records exist. N.J.S.A.

⁴ The Complainant sought an additional record that is not at issue in this complaint.

47:1A-6; see Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005).

3. The Custodian unlawfully denied access to the field trip lists and requests responsive to the Complainant's September 16, 2015 OPRA request No. 1, item Nos. 2 and 3. N.J.S.A. 47:1A-6. Specifically, disclosing portions of the responsive records raises safety and security issues that pose a threat to students, staff, chaperones, and the public at trip locations. However, such a concern is expressly limited to any information revealing a year-to-year cyclical pattern. N.J.S.A. 47:1A-1.1; WNBC-TV v. Allendale Bd. of Educ., et al., 2015 N.J. Super. Unpub LEXIS 1330 (June 4, 2015). Thus, the Custodian must disclose the responsive records, with redactions where absolutely necessary.
4. The Custodian may have unlawfully denied access to the Complainant's September 16, 2015 OPRA request No. 2, item No. 4. N.J.S.A. 47:1A-6. The facts of this complaint call into question whether a purchase order actually existed at the time of the Complainant's OPRA request. Thus, the Custodian must either provide the responsive purchase order for the 2014-2015 school calendars or certify that no record existed at the time of the Complainant's OPRA request.
5. **The Custodian shall comply with conclusion Nos. 3 and 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 1:4-4,⁵ to the Council Staff.⁶**
6. 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 April 25, 2018, the Council distributed its Interim Order to all parties. On May 2, 2018, the Custodian's Counsel sought an extension of five (5) business days to respond to the Council's Order. On the same day, the Government Records Council ("GRC") granted said extension until May 9, 2018.

On May 8, 2018, the Custodian responded to the Council's Interim Order. Therein, the Custodian affirmed that he was providing to the Complainant redacted versions of "Field Trip Considerations" contained in the Superintendent's monthly reports. The Custodian certified that

⁵ "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."

⁶ 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.

the redactions included the number of teachers, staff, and chaperones, as well as the trip locations and dates if they were cyclical on a yearly basis. The Custodian certified that non-cyclical trip information was not redacted. The Custodian also noted that he redacted departure and arrival times for every trip because they were cyclical for all trips. The Custodian affirmed that he made these redactions in compliance with the Council's Order and based on WNBC-TV, 2015 N.J. Super. Unpub LEXIS 1330.

Further, the Custodian certified that he was unable to locate a purchase order for the 2014-2015 school calendars. The Custodian certified that he subsequently learned that there was a purchase order, but it could not be located. The Custodian certified that as an alternative to the purchase order, he was providing to the Complainant a screen shot of the electronic purchase order along with the vendor's quote.⁷

Analysis

Compliance

At its April 24, 2018 meeting, the Council ordered the Custodian to disclose field trip requests and approved lists for the 2014-2015 school year responsive to the Complainant's September 16, 2015 OPRA request No. 1, item Nos. 2 and 3, with redactions where applicable. Additionally, the Council ordered the Custodian to either disclose the purchase order responsive to the Complainant's September 16, 2015 OPRA request No. 2, item No. 4 or certify if no record existed at the time of the OPRA request. The Council finally ordered the Custodian to submit certified confirmation of compliance, in accordance with N.J. Court Rule R. 1:4-4, to Council Staff. On April 25, 2018, the Council distributed its Interim Order to all parties, providing the Custodian five (5) business days to comply with the terms of said Order. Thus, the Custodian's response was due by close of business on May 2, 2018.

On May 2, 2018, the fifth (5th) business day after receipt of the Council's Order, Custodian's Counsel sought a five (5) business day extension to respond to the Order, which the GRC granted. On May 9, 2018, the Custodian responded to the Council's Order. Therein, the Custodian disclosed field trip information for the 2014-2015 school year with redactions, explained the reasoning behind those redactions, and disclosed purchase order information for the 2014-2015 school calendars. The Custodian also included certified confirmation of compliance to the Council Staff. Based on this, the Custodian complied with the Council's Order.

Therefore, the Custodian complied with the Council's April 24, 2018 Interim Order. Specifically, the Custodian responded in the extended time frame disclosing records in accordance with conclusion No. 3 and 4 of the Council's Order. Further, the Custodian simultaneously provided certified confirmation of compliance to the Council Staff.

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

⁷ The Complainant confirmed her satisfaction with the Custodian's response via telephone on June 5, 2018.

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 (id.; Marley v. Borough of Palmyra, 193 N.J. Super. 271, 294-95 (Law Div. 1993)); 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)).

Here, the Custodian unlawfully denied access to the Complainant’s September 16, 2015 OPRA request No. 1, item Nos. 2 and 3, in part. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-6. Further, the Custodian unlawfully denied access to the Complainant’s September 16, 2015 OPRA request No. 2, item No. 4. However, the Complainant’s September 16, 2015 request No. 1, item Nos. 1, 6, 7, and 8 were invalid. Also, the Custodian bore his burden of proving that he lawfully denied access to the Complainant’s April 28, 2015 OPRA request, September 16, 2015 OPRA request No. 1, item Nos. 4 and 5, and the September 16, 2015 OPRA request No. 2, item Nos. 1, 2, and 3 because no records existed. Additionally, the evidence of record does not indicate that the Custodian’s violations of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Conclusions and Recommendations

The Council Staff respectfully recommends the Council find that:

1. The Custodian complied with the Council’s April 24, 2018 Interim Order. Specifically, the Custodian responded in the extended time frame disclosing records in accordance with conclusion No. 3 and 4 of the Council’s Order. Further, the Custodian simultaneously provided certified confirmation of compliance to the Council Staff.
2. The Custodian unlawfully denied access to the Complainant’s September 16, 2015 OPRA request No. 1, item Nos. 2 and 3, in part. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-6. Further, the Custodian unlawfully denied access to the Complainant’s September 16, 2015 OPRA request No. 2, item No. 4. However, the Complainant’s September 16,

2015 request No. 1, item Nos. 1, 6, 7, and 8 were invalid. Also, the Custodian bore his burden of proving that he lawfully denied access to the Complainant's April 28, 2015 OPRA request, September 16, 2015 OPRA request No. 1, item Nos. 4 and 5, and the September 16, 2015 OPRA request No. 2, item Nos. 1, 2, and 3 because no records existed. Additionally, the evidence of record does not indicate that the Custodian's violations of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Prepared By: Frank F. Caruso
Communications Specialist/Resource Manager

June 19, 2018



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
101 SOUTH BROAD STREET
PO Box 819
TRENTON, NJ 08625-0819

PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

INTERIM ORDER

April 24, 2018 Government Records Council Meeting

Christina Moreira
Complainant

Complaint No. 2015-313

v.

Elizabeth Board of Education (Union)
Custodian of Record

At the April 24, 2018 public meeting, the Government Records Council (“Council”) considered the December 12, 2017 Findings and Recommendations of the Council Staff 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 Complainant’s September 16, 2015 request No. 1, item Nos. 1, 6, 7, and 8, seeking certain documents pertaining to all sports equipment purchases and an unidentified brochure would have required research. The Custodian had no legal duty to research his files to locate records potentially responsive to those request items. MAG Entm’t, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005); Bent v. Stafford Police Dep’t, 381 N.J. Super. 30, 37 (App. Div. 2005); N.J. Builders Assoc. v. N.J. Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009); Inzelbuch v. Lakewood Bd. of Educ. (Ocean), GRC Complaint No. 2013-97 (Interim Order dated January 28, 2014); Carter v. Franklin Fire Dist. No. 2 (Somerset), GRC Complaint No. 2012-05 (Final Decision dated June 26, 2012).
2. The Custodian has borne his burden of proof that he lawfully denied access to the Complainant’s April 28, 2015, September 16, 2015 OPRA request No. 1, item Nos. 4 and 5, and the September 16, 2015 OPRA request No. 2, item Nos. 1, 2, and 3 based on the Custodian’s certified statements that no responsive records exist. N.J.S.A. 47:1A-6; see Pusterhofer v. N.J. Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005).
3. The Custodian unlawfully denied access to the field trip lists and requests responsive to the Complainant’s September 16, 2015 OPRA request No. 1, item Nos. 2 and 3. N.J.S.A. 47:1A-6. Specifically, disclosing portions of the responsive records raises safety and security issues that pose a threat to students, staff, chaperones, and the public at trip locations. However, such a concern is expressly limited to any information revealing a year-to-year cyclical pattern. N.J.S.A. 47:1A-1.1; WNBC-TV v. Allendale Bd. of Educ., et al, 2015 N.J. Super. Unpub LEXIS 1330 (June 4, 2015). Thus, the



Custodian must disclose the responsive records, with redactions where absolutely necessary.

4. The Custodian may have unlawfully denied access to the Complainant's September 16, 2015 OPRA request No. 2, item No. 4. N.J.S.A. 47:1A-6. The facts of this complaint call into question whether a purchase order actually existed at the time of the Complainant's OPRA request. Thus, the Custodian must either provide the responsive purchase order for the 2014-2015 school calendars or certify that no record existed at the time of the Complainant's OPRA request.
5. **The Custodian shall comply with conclusion Nos. 3 and 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. 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 April, 2018

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: April 25, 2018

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 Council Staff
April 24, 2018 Council Meeting**

**Christina Moreira¹
Complainant**

GRC Complaint No. 2015-313

v.

**Elizabeth Board of Education (Union)²
Custodial Agency**

Records Relevant to Complaint:

April 28, 2015 OPRA request:³

1. Purchase orders/invoices/checks for the 2014-2015 Budget Item “Equalization Aid” for the Elizabeth Board of Education (“EBE”).
2. Purchase orders/invoices/checks for the 2014-2015 Budget Item “Categorical Special Education Aid” for the EBE.

September 16, 2015 OPRA request 1:

1. A copy of all contracts for athletic gear and/or equipment entered into by the EBE during the 2013-14 and 2014-15 school years.
2. A copy of all field trip requests from each EBE school during the 2014-15 school year.
3. A list of all approved field trips taken during the 2014-15 school year.
4. A copy of the EBE and each individual school budget for the 2014-15 school year, reflecting line items for school trips.
5. A copy of the EBE and each individual school budget for the 2014-15 school year, reflecting line items for transportation related to school trips.
6. A copy of all vendor contracts for purchase of the 3-4 page pamphlets/fliers containing “school excellence” information for the 2014-15 school year. These 3-4 page pamphlets/fliers were distributed to parents roughly four (4) times during the 2014-15 school year. A photograph has been included for identification purposes.
7. A copy of all invoices reflecting payment requests for the 3-4 page pamphlets/fliers containing “school excellence” information for the 2014-15 school year. These 3-4 page pamphlets/fliers were distributed to parents roughly four (4) times during the 2014-15 school year. A photograph has been included for identification purposes.

¹ No legal representation listed on record.

² Represented by Edward J. Kologi, Esq. of Kologi, Simitz (Linden, NJ). Previously represented by Jonathan Williams, Esq., of DeCotiis, FitzPartrick & Cole, LLP (Teaneck, NJ) and Bruce Rosen, Esq., of McCusker, Anselmi, Rosen & Carvelli, P.C. (Florham Park, NJ).

³ The Complainant sought additional records that are not at issue in this complaint.

8. A copy of all vouchers for payment of the 3-4 page pamphlets/fliers containing “school excellence” information for the 2014-15 school year. These 3-4 page pamphlets/fliers were distributed to parents roughly four (4) times during the 2014-15 school year. A photograph has been included for identification purposes.

September 16, 2015 OPRA request 2:⁴

1. Document for the job posting of Supervisor of Innovative Programming for the 2014-2015 and 2015-2016 school years for the district.
2. Résumé of Carlos Lucio, Supervisor of Innovative Programming.
3. List of candidates that applied for position of Supervisor of Innovative Programming.
4. Purchase order for the 2014-2015 school calendar for the EBE (including cost and amount of calendars ordered).

Custodian of Record: Harold E. Kennedy, Jr.

Requests Received by Custodian: April 28, 2015; September 16, 2015

Response Made by Custodian: May 7, 2015; September 28, 2015

GRC Complaint Received: October 2, 2015

Background⁵

Request and Response:

On April 28, 2015, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On May 7, 2015, the Custodian responded in writing, as follows:

- Item No. 1: The EBE did not maintain retrievable, responsive records.
- Item No. 2: The EBE did not maintain retrievable, responsive records.

On May 11, 2015, the Complainant wrote to the Custodian, asking for a reconsideration of the denial to her April 28, 2015 OPRA request. She noted that the “user friendly budget” contained “line items” for the referenced accounts. The Complainant further stated that she sought documents/account statements showing transactions the EBE paid out of referenced accounts. On May 18, 2015, the Custodian wrote to the Complainant, denying the reconsideration request as the EBE did not maintain retrievable records.

On September 16, 2015, the Complainant submitted two (2) OPRA requests to the Custodian seeking the above-mentioned records. On September 28, 2015, the Custodian responded in writing to the Complainant’s September 16, 2015 OPRA request No. 1, as follows:

⁴ The Complainant sought an additional record that is not at issue in this 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.

- Item No. 1: The EBE did not maintain retrievable records within the category listed. Further, researching, compiling and creating such information “falls outside the controlling authority of [OPRA].”
- Item No. 2: Access is denied because in order to comply with the EBE’s obligation to protect against disclosure of “personally identifiable” field trip information which, if disclosed, would jeopardize the safety and security of its students.
- Item No. 3: Access is denied because in order to comply with the EBE’s obligation to protect against disclosure of “personally identifiable” field trip information which, if disclosed, would jeopardize the safety and security of its students.
- Item No. 4: The EBE did not maintain retrievable records within the category listed. The Custodian advised that researching, compiling, and creating such information “falls outside the controlling authority of [OPRA].”
- Item No. 5: The EBE did not maintain retrievable records within the category listed. The Custodian advised that researching, compiling, and creating such information “falls outside the controlling authority of [OPRA].”
- Item No. 6: Access is denied because the Complainant did not attach the referenced photograph. Further, the EBE did not maintain retrievable records within the category listed. The Custodian advised that researching, compiling, and creating such information “falls outside the controlling authority of [OPRA].”
- Item No. 7: Access is denied because the Complainant did not attach the referenced photograph. Further, the EBE did not maintain retrievable records within the category listed. The Custodian advised that researching, compiling, and creating such information “falls outside the controlling authority of [OPRA].”
- Item No. 8: Access is denied because the Complainant did not attach the referenced photograph and additionally noted that the EBE did not maintain retrievable records within the category listed. Further, a custodian is not required to conduct research or compile and create such information

On the same day, the Custodian also responded in writing to the Complainant’s September 16, 2015 OPRA request No. 2 as follows:

- Item No. 1: The EBE did not maintain retrievable, responsive records.
- Item No. 2: The EBE did not maintain retrievable, responsive records.
- Item No. 3: The EBE did not maintain retrievable, responsive records.
- Item No. 4: The EBE did not maintain retrievable, responsive records.

Denial of Access Complaint:

On October 2, 2015, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”).

April 28, 2015 OPRA request

The Complainant contested the Custodian’s denial of access but did not provide any legal arguments as to why she believed she was unlawfully denied access.

September 16, 2015 OPRA request No. 1

The Complainant asserted that her September 16, 2015 OPRA request No. 1 was a rewording of a previous OPRA request (which the EBE denied). The Complainant made no additional legal arguments.

September 16, 2015 OPRA request No. 2

The Complainant also disputed the Custodian's denial to her September 16, 2015 OPRA request No. 2. The Complainant contended that the Custodian's denial of Item No. 1, which sought a specific job posting, was wrong. The Complainant alleged that, "well after" the denial, "a teacher in the [EBE]" provided her with a copy of the posting. The Complainant argued that therefore "there must be [a] record." The Complainant made no additional legal arguments regarding the remaining items.

Statement of Information:

On November 6, 2015, the Custodian filed a Statement of Information ("SOI").

April 28, 2015 OPRA request

The Custodian certified that he received the Complainant's OPRA request on April 28, 2015. The Custodian certified that he and members of his staff searched for responsive records in the Business Administrator/Board Secretary office, among other locations. The Custodian affirmed that he also reviewed the EBE's 2014-2015 budget. The Custodian certified that he responded in writing on May 7, 2015, denying access to both requested items because no records existed.

The Custodian certified that no records responsive to either of the OPRA request items existed. Specifically, the Custodian certified that, although the EBE's budget contains line items for "Equalization Aid" and "Categorical Special Education Aid," both "are revenue accounts from which no purchase orders/invoices/checks can be drawn." The Custodian certified that revenue accounts are used to account for sources of income, not to pay expenses. The Custodian reiterated that, contrary to the Complainant's appeals for disclosure on May 11, 2015, no money is paid out of revenue accounts.

September 16, 2015 OPRA request No. 1

The Custodian certified that he received the Complainant's OPRA request on September 16, 2015. The Custodian noted that the request was the same as an unrelated OPRA request that the Complainant previously submitted to which he denied access. The Custodian certified that he and members of his staff again searched for responsive records in the Business Administrator/Board Secretary office, among other locations. The Custodian affirmed that he also reviewed the EBE's 2014-2015 budget.

The Custodian certified that he responded in writing on September 28, 2015, denying access to all requested items for various reasons. The Custodian affirmed that he could not disclose any records responsive to item No. 1 because no single contract for athletic equipment existed, nor did a single company provide all equipment to the EBE. The Custodian certified that he would have had to review and research EBE's budget appropriation ledger to identify athletic equipment purchases. The Custodian also certified that he denied access to item Nos. 2 and 3 because field trip information, to include date and location, are exempt from disclosure because personally identifiable information, if disclosed, would jeopardize the safety and security of students by revealing a field trip pattern to members of the public. N.J.S.A. 47:1A-1; N.J.S.A. 47:1A-9; Family Educational Rights and Privacy Act ("FERPA") at 20 U.S.C. 1232g; N.J.S.A. 18A:36-35; N.J.A.C. 6A:32-7; EBE Policy No. 6153 (reflecting language in N.J.S.A. 18A:36-35). The Custodian averred that he denied access to item Nos. 4 and 5 for the same reasons he denied item No. 1. Finally, the Custodian affirmed that he denied access to item Nos. 6, 7, and 8 because they were invalid. The Custodian certified that the Complainant did not include a photograph or any other description of the brochure referenced in the items.

The Custodian argued that he lawfully denied access to all request items. The Custodian asserted that OPRA did not require him to conduct the research necessary to provide suitable responses to item Nos. 1, 4, and 5. Further, the Custodian contended that disclosing field trip information responsive to item Nos. 2 and 3 would present a danger to EBE students. Further, the Custodian argued that, even if he could redact all exempt information out of the nearly 600 responsive field trip records (locations, dates, and times), such an action would require an extraordinary amount of time and effort. Finally, the Custodian argued that item Nos. 6, 7, and 8 were invalid because the Complainant sufficiently failed to identify the brochure for which she sought contracts, invoices, and vouchers. The Custodian noted that the Complainant stated that she included a photograph of the brochure but that no such photo was attached to the request upon receipt.

September 16, 2015 OPRA request No. 2

The Custodian certified that he received the Complainant's OPRA request on September 16, 2015. The Custodian reiterated the search he and staff conducted from above. The Custodian certified that he responded in writing on September 28, 2015, denying access to all items because no records existed.

The Custodian affirmed that the reason no records responsive to item Nos. 1, 2, 3 existed was because Monica Martinez applied for and was initially awarded the Programming position for the 2014-2015 and 2015-2016 school years. The Custodian certified that after Ms. Martinez resigned, Mr. Lucio was transferred to the position by EBE resolution. The Custodian affirmed the transfer resulted in no job posting for the 2014-2015 or 2015-2016 school years and no résumé collection or candidates list. The Custodian also certified that no records responsive to item No. 4 existed because the EBE had not yet created a 2014-2015 calendar purchase order at the time of receipt of the subject OPRA request.

The Custodian noted that the Complainant subsequently e-mailed him, stating that she received a copy of a posting for Supervisor of Innovative Programming that was responsive to

the request. The Custodian affirmed that the job posting the Complainant obtained was actually for the 2013-2014 school year and that the EBE published the posting to its website on March 25, 2014, with a closing date of April 9, 2014. The Custodian also certified that it was this posting from which the EBE hired Ms. Martinez for the 2013-2014 school year.

Regarding all OPRA requests, the Custodian argued that the Complainant failed to state a clear claim in her Denial of Access Complaint. The Custodian contended that the Complainant's assertion that one of her OPRA requests was a rewording of a prior OPRA request and her assertion that the EBE had to maintain records responsive to her requests did not adequately detail those responses with which she took issue. The Custodian further contended that the Complainant was mistaken that a responsive job posting for the Supervisor of Innovative Programming existed.

Regarding the Complainant's April 28, 2015 OPRA request, the September 16, 2015 OPRA request No. 1, item Nos. 4, and 5, and the September 16, 2015 OPRA request, where no records existed, the Custodian asserted that well-established case law provided that no unlawful denial of access could occur when no records exist. Bent v. Twp. of Stafford Police Dep't, 381 N.J. Super. 30, 38 (App. Div. 2005). The Custodian contended that the Complainant's September 16, 2015 OPRA request No. 1, item Nos. 4 and 5, sought line items that did not appear in any of the budgets.

Further, the Custodian contended that a number of the requested items within each OPRA request required research, which a custodian is not required to conduct in order to respond to an OPRA request. MAG Entm't, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005); Burnett v. Cnty. of Gloucester, 415 N.J. Super. 506, 515 (App. Div. 2010). For instance, the Custodian argued that to respond to the Complainant's September 16, 2015 OPRA request No. 1, item No. 1, he would have to research individual athletic equipment charges in the budget, determine which companies the EBE bought athletic equipment from, and then look for any related contracts. Further, the Custodian contended that he would have to conduct research to obtain costs responsive to the Complainant's September 16, 2015 OPRA request No. 1, item Nos. 4 and 5, by analyzing the EBE's budget appropriation ledger to obtain total costs. The Custodian contended that additional items failed to identify with reasonable clarity the records sought. MAG, 375 N.J. Super. at 549.

Additionally, the Custodian contended that he properly denied access to responsive field trip records. The Custodian argued that the Supreme Court of New Jersey has long recognized that schools have an obligation to afford protections for students. Leang v. Jersey City Bd. of Educ., 198 N.J. 557, 580 (2009); Jerkins ex rel. Jerkins v. Anderson, 191 N.J. 285, 289 (2007); Frugis v. Bracigliano, 177 N.J. 250, 268 (2003). The Custodian asserted that New Jersey statutes and regulations set forth numerous safeguards against disclosure of student records and personally identifiable information. For instance, the Custodian stated that N.J.S.A. 18A:36-35 prohibits a board of education from disclosing personally identifiable student information on its website, including "locations and times of class trips," without consent from a student's parent or guardian. The Custodian contended that this exemption more broadly prohibits public disclosure of class trip information absent parental consent. The Custodian argued that the statute conforms with the well-established limitation on disclosure of "student records" under N.J.A.C. 6A:32-2

and N.J.A.C. 6A:32-7. See also 20 U.S.C. 1232g(a)(4)(A); (b)(1). The Custodian contended that his denial was lawful under OPRA pursuant to N.J.S.A. 47:1A-9. The Custodian noted that the EBE also had an obligation to protect the students' reasonable expectation of privacy. N.J.S.A. 47:1A-1. The Custodian contended that disclosure of exact dates, times, and locations of field trips would violate the students' privacy and safety.

The Custodian contended that, even if the field trip records were disclosable, the EBE would require a special service charge to redact those records. N.J.S.A. 47:1A-5(c). The Custodian averred that there were at least 593 field trip requests for the 2014-2015 school year: redacting the locations and times for each trip would require an extraordinary amount of time and effort.

Finally, the Custodian contended that the Complainant's September 16, 2015 OPRA request No. 1, item Nos. 6, 7, 8, failed to specify the records sought. MAG, 375 N.J. Super. 534; Burke v. Brandes, 429 N.J. Super. 169, 177 (App. Div. 2012); Bart v. Passaic Cnty. Hous. Auth., 406 N.J. Super. 445, 451-452 (App. Div. 2009). The Custodian argued that the Complainant sought records regarding an amorphous brochure and claimed that she included a picture to aid the Custodian in identifying response records: no such photograph was attached. The Custodian argued that, in the absence of the photograph, he would have been forced to speculate as to which brochures the Complainant sought.

Additional Submissions:

On March 9, 2018, the GRC sought additional information from the Custodian. Specifically, the GRC noted that several issues of fact are raised by the Custodian's responses to the September 16, 2015 OPRA request no. 1, item nos. 1 through 5. The GRC thus requested a legal certification from the Custodian to answer the following questions:

1. Regarding the athletic gear contracts for the 2013-2014 and 2014-2015 school years sought in the September 16, 2015 OPRA request No. 1, item No. 1, are all contracts maintained in a central location allowing for a reasonable search to locate responsive records? If not, provide additional detail as to the process necessary to locate these contracts.
2. Regarding the field trip requests for the 2014-2015 school year sought in the September 16, 2015 OPRA request No. 1, item No. 2, can the records be reasonably redacted to address the EBE's concerns
3. Regarding the field trip list for the 2014-2015 school year sought in the September 16, 2015 OPRA request No. 1, item No. 3:
 - a. Does the EBE maintain a list of 2014-2015 school field trips? If so, does the list contain any information that should or could be redacted?
 - b. Does the EBE maintain field trip information in an electronic database or other system.
 - c. If the list exists, does it reveal a cyclical pattern of field trips when compared to more current lists?
 - d. Is the EBE required to approve field trips by official vote of the elected officials?

4. Regarding the line items identified in the September 16, 2015 OPRA request No. 1, item Nos. 4 and 5, does the full budget (as opposed to the user friendly budget) contain such items or are they included as part of a larger expenditure?

The GRC stated that the Custodian's deadline to submit the requested legal certification was March 14, 2018. On March 9, 2018, Custodian's Counsel sought and received an extension of time until March 19, 2018.

On March 15, 2018, the Custodian responded to the GRC's request for additional information. Therein, the Custodian certified to the following:

1. Athletic gear may be purchased by purchase order, State contract, or formal bid. Such contracts are not maintained by category, but filed chronologically. A manual search of over 20,000 purchase orders and a separate search of Resolutions approving State contract purchases and bids would be required.
2. Records can be redacted to address the EBE's security concerns. 593 field trip requests exist for the 2014-2015 school year.
3. See below:
 - a. The EBE does not maintain a "list." The EBE receives a monthly report of all field trips. Each report would need to be searched and redacted.
 - b. Only the monthly reports exist and are maintained in Microsoft® Word format.
 - c. The monthly reports would reveal a cyclical pattern of field trips.
 - d. The EBE is required to approve field trips by official vote of the elected members.
4. Field trip costs are not contained in any one line item in either the user-friendly or full budgets. Parents often pay costs directly. Transportation costs for the trips may be included under the Transportation line item and the drivers' salaries/overtime may be included as part of the Salary/Overtime line item.

Analysis

Validity of OPRA Request

The New Jersey Superior Court, Appellate Division has held that:

While OPRA provides an alternative means of access to government documents not otherwise exempted from its reach, *it is not intended as a research tool litigants may use to force government officials to identify and siphon useful information. Rather, OPRA simply operates to make identifiable government records "readily accessible for inspection, copying, or examination."* N.J.S.A. 47:1A-1.

[MAG, 375 N.J. Super. at 546 (emphasis added).]

The court reasoned that:

Most significantly, the request failed to identify with any specificity or particularity the governmental records sought. *MAG provided neither names nor any identifiers other than a broad generic description of a brand or type of case prosecuted by the agency in the past.* Such an open-ended demand required the Division's records custodian to manually search through all of the agency's files, analyze, compile and collate the information contained therein, and identify for MAG the cases relative to its selective enforcement defense in the OAL litigation. Further, once the cases were identified, the records custodian would then be required to evaluate, sort out, and determine the documents to be produced and those otherwise exempted.

[Id. at 549 (emphasis added).]

The court further held that “[u]nder OPRA, agencies are required to disclose only ‘identifiable’ government records not otherwise exempt In short, OPRA does not countenance open-ended searches of an agency's files.” Id. at 549 (emphasis added). Bent v. Stafford Police Dep’t, 381 N.J. Super. 30, 37 (App. Div. 2005);⁶ N.J. Builders Assoc. v. N.J. Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).

In Inzelbuch v. Lakewood Bd. of Educ. (Ocean), GRC Complaint No. 2013-97 (Interim Order dated January 28, 2014), the complainant sought a number of records over two (2) OPRA requests. Among those items in the December 4, 2012 OPRA request, the complainant sought “any and all contracts” and “those vendors” providing certain services to the Lakewood Board of Education (“BOE”). The custodian denied access to the requested item as invalid because it failed to “specify a readily identifiable document.” The Council agreed, holding that the requested item was invalid because it required research. The Council noted that the requested item only identified the record with a broad generic description and contained no time frame.

Moreover, in Carter v. Franklin Fire Dist. No. 2 (Somerset), GRC Complaint No. 2012-05 (Final Decision dated June 26, 2012), the Council determined that the complainant’s request seeking purchase orders, vouchers, *etc.*, without vendor names or dates, was invalid. In coming to this conclusion, the Council noted that:

[T]he Complainant candidly stated that he could neither provide dates nor vendors for the records he requested. Without such information, the only way the Custodian would be able to comply with the Complainant’s request would be to disclose all records of the type requested within the agency's files. The courts have determined that such an all-encompassing request is not contemplated by OPRA.

[Id. at 7.]

The Council subsequently denied the complainant’s request for reconsideration, and he appealed to the Appellate Division. On remand from the Appellate Division, the Council revisited the

⁶ Affirming Bent v. Stafford Police Dep’t, GRC Case No. 2004-78 (October 2004).

complainant's request and again determined that same was invalid for substantially matching reasons. Carter, GRC 2012-05 (May 2015).

In the instant complaint, the Complainant's September 16, 2015 OPRA request No. 1, item No. 1, sought contracts for sports equipment purchases from 2013-14 and 2014-15, not inclusive of companies. In response to those requested items, the Custodian denied them, advising that he would be required to do research and create records for item No. 1. In the SOI, the Custodian elaborated on his denial by arguing that he would have had to identify equipment purchases in the EBE's budget to locate the companies from whom it purchased sports equipment. The Custodian further argued that he would then have to attempt to locate contracts for those companies. On March 18, 2018, the Custodian subsequently provided additional detail on the search required to locate responsive records. The Custodian certified that the EBE could purchase sports equipment by purchase order, State contract, or formal bid. The Custodian certified that these types of contracts were not kept categorically, but chronologically. The Custodian affirmed that he would be required to review 20,000 or more invoices, as well as review many resolutions, to locate possible sports equipment purchases.

The GRC agrees that the requested item is invalid because it would require research. The Complainant identified a type of record (contracts) and a type of service (sports equipment). The GRC notes that the request item departs from the one in Inzelbuch, GRC 2013-97, in that it contains a time frame (entered into during the 2014-2015 school year). However, much like the custodian in Inzelbuch, GRC 2013-97, the Custodian would have been required to do research to locate the responsive records. Specifically, as the Custodian certified in the SOI, he would have been required to go line by line through the budget to identify equipment purchases because the EBE does not contract with one particular company. Once he located those purchases, he would have been required to identify the company, obtain the contract, and determine whether the EBE contracted with them during the 2014-2015 school year. The Custodian's research claim is further supported by the manner in which the EBE purchased athletic equipment and the process described to locate any such "contracts." Such actions clearly resonate as research that is not countenanced under OPRA.

Moreover, the Complainant's September 16, 2015 OPRA request no. 1, item nos. 6, 7, and 8 sought contracts, invoices, and vouchers pertaining to the "3-4 page pamphlets/fliers containing 'school excellence' information for the 2014-15 school year" distributed to parents roughly four (4) times a year. The Complainant noted that she included a photograph of the brochure, but the evidence of record indicates that she did not include any photograph. The Custodian denied item Nos. 6, 7, and 8 as invalid because the Complainant failed to include the photograph. For this reason, the Custodian argued that he could not identify responsive records because the Complainant did not sufficiently identify the corresponding brochure. In the SOI, the Custodian argued that those requested items were impermissibly overbroad. Specifically, the Custodian argued that the items required him to speculate the brochures to which the Complainant referred and then attempt to locate responsive records.

The GRC also finds that requested item Nos. 6, 7, and 8 are invalid pursuant to MAG, 375 N.J. Super. 546; Bent, 381 N.J. Super. 37; NJ Builders, 390 N.J. Super. 180, and the Council's decision in Carter, GRC 2012-05, which involved similar requests for purchase orders,

vouchers, and checks, without vendor names and purchase dates being specified. Here, request item nos. 6, 7, and 8 also do not sufficiently identify either a vendor or titles or dates of the pamphlets. Although the Complainant provided some details about the pamphlets, they were inadequate to cure the deficiencies in the requests. In the absence of the referenced photograph, the request items as described would have required research for a response. The Custodian would have had to guess which pamphlet was responsive, determine who created and printed the pamphlet, and search through all contracts, invoices, and vouchers to locate any responsive records. Therefore, the Custodian could not, and was not obligated under OPRA to, respond to request item nos. 6, 7, and 8.

Accordingly, the Complainant's September 16, 2015 request No. 1, item Nos. 1, 6, 7, and 8, seeking certain documents pertaining to all sports equipment purchases and an unidentified brochure would have required research. The Custodian had no legal duty to research his files to locate records potentially responsive to those request items. MAG, 375 N.J. Super. at 546; Bent, 381 N.J. Super. at 37; NJ Builders, 390 N.J. Super. at 180; Schuler, GRC 2007-151; Inzelbuch, GRC 2013-97; Carter, 2012-05.

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.

April 28, 2015 OPRA request, September 16, 2015 OPRA request No. 1, item Nos. 4 and 5, and September 16, 2015 OPRA request No. 2, item Nos. 1, 2, and 3

The Council has previously found that, where a custodian certified that no responsive records exist, no unlawful denial of access occurred. See Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005). Here, the Custodian denied access to the April 28, 2015 OPRA request. Further, the Custodian denied access to the Complainant's September 16, 2015 OPRA request No. 1, item Nos. 4 and 5, because no line items existed within the budget. The Custodian also denied access to the Complainant's September 16, 2015 OPRA request No. 2, item Nos. 1, 2, and 3 because no records existed. The Custodian subsequently certified to those facts in the SOI. Additionally, there is no evidence in the record to refute that the Custodian did not possess the responsive records.

Regarding the Complainant's April 28, 2015 OPRA request, the Custodian affirmed in the SOI that no records existed because the accounts identified are revenue accounts from which no funds could be drawn. The GRC is thus satisfied that a finding of no records exist is accurate because no purchase orders, invoices, or checks can originate from an account with no spending power.

Regarding the Complainant's September 16, 2015 OPRA request No. 1, item Nos. 4 and 5, the Custodian certified that no such transportation line items were present in the budget. The

Custodian later supplemented his SOI response by certifying that field trip costs were not contained in any one line item in either the user-friendly or full EBE budget. The Custodian did note that certain transportation and driver salary information could be included as part of two (2) line items.

Notwithstanding, the GRC is also satisfied that a finding of no records exist is accurate. The Custodian could have provided EBE's standard budget to the Complainant, but it was clear the budget, in this form, would not have been responsive to Complainant's request. Specifically, although the Complainant referred to the budget, which would be disclosable, she sought one that included specific line items. The Complainant sought a version of the budget – one containing specific line items for school trips and associated transportation – which the Custodian twice certified does not exist. Thus, even if the GRC were to compel disclosure of the budget, it would not be responsive because no line items for school trips and associated transportation existed per the Custodian.

Regarding the Complainant's September 16, 2015 OPRA request No. 2, item Nos. 1, 2, and 3, the Custodian certified that no records responsive exist because the EBE did not post the Supervisor of Innovative Programming job vacancy in the identified school years, did not collect résumés or a candidate list, and has not yet created a purchase order for the 2014-2015 school calendar.

Accordingly, the Custodian has borne his burden of proof that he lawfully denied access to the Complainant's April 28, 2015, September 16, 2015 OPRA request No. 1, item Nos. 4 and 5, and the September 16, 2015 OPRA request No. 2, item Nos. 1, 2, and 3 based on the Custodian's certified statements that no responsive records exist. N.J.S.A. 47:1A-6; see Pusterhofer, GRC 2005-49.

September 16, 2015 OPRA request No. 1, item Nos. 2 and 3

OPRA provides that “any limitations on the right of access . . . shall be construed in favor of the public's right of access.” N.J.S.A. 47:1A-1. Further, OPRA provides that a custodian has “an obligation to safeguard from public access a citizen's personal information with which it has been entrusted when disclosure thereof would violate the citizen's reasonable expectation of privacy . . .” Id.

Also, OPRA exempts disclosure of records that contain emergency or security information or procedures for any buildings or facility which, if disclosed, would jeopardize security of the building or facility or persons therein.” N.J.S.A. 47:1A-1.1. In WNBC-TV v. Allendale Bd. of Educ., et al, 2015 N.J. Super. Unpub LEXIS 1330 (June 4, 2015), the New Jersey Superior Court, Appellate Division, reviewed how this exemption applied to school security drill records. There, plaintiff filed a cause of action after several school districts had provided access to Security Drill Records Forms (“Forms”) with redactions for the exact dates, times, and drill durations. Defendants collectively argued that the information was exempt under N.J.S.A. 47:1A-1.1 as “emergency and security information.” Defendants also provided the court with a detailed description applying the exemption to the redacted information. The court agreed, holding that defendants lawfully redacted the responsive Forms. The court reasoned that

disclosure of the information would necessarily pose a threat to the students and faculty, as well as the applicable buildings. The court further noted that an individual's ability to discern patterns useful for causing harm warranted redaction of the dates, times, and durations as "emergency and security information."

Further, OPRA provides that its provisions "shall not abrogate any exemption of a public record or government record from public access heretofore made pursuant to [OPRA]; any other *statute . . . regulation* promulgated under the authority of any statute or Executive Order of the Governor . . . any *federal law; federal regulation; or federal order.*" N.J.S.A. 47:1A-9(a) (emphasis added).

Moreover, N.J.S.A. 18A:36-35 provides that:

The board of education of each school district and the board of trustees of each charter school that establishes an *Internet web site, shall not disclose on that web site any personally identifiable information about a student* without receiving prior written consent from the student's parent or guardian on a form developed by the Department of Education. The written consent form shall contain a statement concerning the potential dangers of personally identifiable information about individual students on the Internet.

As used in this act, "*personally identifiable information*" means student names, student photos, student addresses, student e-mail addresses, student phone numbers, and *locations and times of class trips*.

[Id. (emphasis added).]

The regulations of the State Board of Education and the Commissioner define a "student record" as "*information related to an individual student gathered within or outside the school district and maintained within the school district, regardless of the physical form in which it is maintained.*" N.J.A.C. 6A:32-2.1 (emphasis added). The regulations of the State Board of Education and the Commissioner of Education provide that "[o]nly authorized organizations, agencies or persons as defined herein shall have access to student records . . ." to include "the parent of the student under the age of 18 . . ." N.J.A.C. 6A:32-7.5(e)(1). Finally, the regulations require that "[i]n complying with this section, individuals shall adhere to requirements pursuant to [OPRA] and [FERPA]." N.J.A.C. 6A:32-7.5(g).

The Complainant's September 16, 2015 OPRA request No. 1, item Nos. 2 and 3 sought field trip requests and a list of approved field trips for the 2014-2015 school year. The Custodian denied access based on privacy grounds, citing safety concerns for students. The Custodian stated that disclosure of "'personally identifiable' field trip information . . . would jeopardize the safety and security of [the] students." In the SOI, the Custodian substantiated his denial by citing to N.J.S.A. 47:1A-1, N.J.S.A. 47:1A-9, FERPA, N.J.S.A. 18A:36-35, N.J.A.C. 6A:32-7, and EBE Policy No. 6153 (reflecting language in N.J.S.A. 18A:36-35). Later, the Custodian certified that no single list existed, but that the EBE received a monthly report containing field trip lists. Additionally, the Custodian affirmed that the EBE was required to approve trips by official vote.

Finally, the Custodian affirmed that although the records at issue here could reveal a cyclical trip schedule, they could be redacted to address the EBE's security concerns.

Initially, the GRC noted that N.J.S.A. 18A:36-35 prohibits access to field trip times and locations. However, the exemption is specific to posting said information on the EBE's website. For that reason, the GRC does not believe that the statute applies to the general disclosure of field trip records. Further, the GRC is not convinced that field trip requests and a list of approved field trips constitutes "student records" as defined under FERPA and the New Jersey Department of Education's regulations. The requested records do not pertain to any individual student; rather, such records appear administrative in nature. That is, a teacher's request for approval from the EBE for a field trip and the list of all field trips approved do not associate with "an individual student." See N.J.A.C. 6A:32-2.1. Additionally, and for the preceding reasons, the GRC is not persuaded that the privacy exemption applies to those records. Specifically, there is no indication that any personal student information was contained in any of the records. Further, the particulars of a field trip do not invoke privacy implications in the same way that home addresses, telephone numbers, *etc.* do.

Regarding the asserted exemption, the GRC agrees that unredacted disclosure of the lists and field trip requests could invoke the emergency and security exemption under N.J.S.A. 47:1A-1.1. Although an unpublished decision, the GRC looks to WNBC, 2015 N.J. Super. Unpub. LEXIS 1330, for guidance. As noted above, the WNBC Court determined that defendants properly redacted certain information from the forms under N.J.S.A. 47:1A-1.1. The Court engaged in a well-reasoned argument that disclosure of certain information on the Forms would allow individuals to know when the student body was congregating outside or being held within the schools for a certain period of time. The Court stated that nondisclosure would "prevent a diseased and malignant mind" from obtaining "useful information" he/she could use to harm the students or the building. Id. at 38. The Court also stated that this information could provide a discernable pattern useful to a similar person "intent on causing harm." Id.

Here, the field trip records, which the Custodian denied in their totality, do not warrant the same level of security protection accorded to the subject Forms in WNBC. But the WNBC court's reasoning is applicable here because disclosure of field trip records could pose a threat to the student and public safety to the extent they would reveal cyclical trip patterns for each school year. As noted by the Custodian, New Jersey has demonstrated its paramount concern for protecting our children and schools through the enactment of statutes, promulgation of regulations, and issuance of judicial decisions. The decision in WNBC is consistent with these aims, as the subject Forms were properly redacted to withhold information about where and when students congregate inside and outside of their school.

Similarly here, disclosure of particular field trip information could pose a real danger to students, staff, and chaperones, which would occur outside the school environs. It is without question that the likelihood of child and school-related crimes being committed would be greater if nefarious individuals predisposed to committing those criminal acts have access to this information. Further, those same nefarious individuals could use field trip information to determine when a larger than usual number of field trips are overloading a particular place of interest, making it easier for them to commit a crime undetected. Conversely, a person could also

determine if a large number of students are taking a trip, thus leaving the school short-staffed and exposed to criminal acts. Such security knowledge puts both the field trip destination and the sending school building at great risk. Finally, any individual could determine a pattern of annual field trips, which could be “useful to a person intent on causing harm.” WNBC, 2015 N.J. Super. Unpub. LEXIS 1330 at 38.

Notwithstanding, in viewing the above with an eye towards construing OPRA in favor of the public’s right to access as provided for in N.J.S.A. 47:1A-1, the 2014-2015 monthly lists and field trip requests are disclosable with redactions where applicable. Specifically, N.J.A.C. 6A:32-2.1 and DOE’s regulations governing “student records” do not apply because the information is not on a website and is not specific to individual students. Further, the Custodian has certified that although the records may reveal a cyclical pattern of school trips taken each year, they can be redacted to address any security concerns. Finally, the EBE is required to approve said trips by formal action at a public meeting. For these reasons, the GRC is ordering disclosure of responsive field trip records, redacted if necessary should a safety risk be posed with disclosure of that information.

Accordingly, the Custodian unlawfully denied access to the field trip lists and requests responsive to the Complainant’s September 16, 2015 OPRA request No. 1, item Nos. 2 and 3. N.J.S.A. 47:1A-6. Specifically, disclosing portions of the responsive records raises safety and security issues that pose a threat to students, staff, chaperones, and the public at trip locations. However, such a concern is expressly limited to any information revealing a year-to-year cyclical pattern. N.J.S.A. 47:1A-1.1; WNBC, 2015 N.J. Super. Unpub LEXIS 1330. Thus, the Custodian must disclose the responsive records, with redactions where absolutely necessary.

September 16, 2015 OPRA request No. 2, item No. 4

This particular OPRA request item sought access to purchase orders for the 2014-2015 school calendar. The Custodian initially responded that no records existed and subsequently certified to this fact in the SOI. The Custodian justified his response by stating that no records existed because the EBE has not created a purchase order at the time of the OPRA request.

While the GRC has typically found that the foregoing would warrant a determination that no records exist, the facts here give pause. Specifically, the Complainant, at the beginning of the 2015-2016 school year, requested an invoice for the calendar produced for the 2014-2015 school year. The fact that the EBE would not have a responsive invoice for the prior school year’s calendar is questionable. Thus, because it is unclear whether a responsive invoice still exists, the GRC declines to apply Pusterhofer at this time.

Accordingly, the Custodian may have unlawfully denied access to the Complainant’s September 16, 2015 OPRA request No. 2, item No. 4. N.J.S.A. 47:1A-6. The facts of this complaint call into question whether a purchase order actually existed at the time of the Complainant’s OPRA request. Thus, the Custodian must either provide the responsive purchase order for the 2014-2015 school calendars or certify that no record existed at the time of the Complainant’s OPRA request.

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 Council Staff respectfully recommends the Council find that:

1. The Complainant's September 16, 2015 request No. 1, item Nos. 1, 6, 7, and 8, seeking certain documents pertaining to all sports equipment purchases and an unidentified brochure would have required research. The Custodian had no legal duty to research his files to locate records potentially responsive to those request items. MAG Entm't, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005); Bent v. Stafford Police Dep't, 381 N.J. Super. 30, 37 (App. Div. 2005); N.J. Builders Assoc. v. N.J. Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009); Inzelbuch v. Lakewood Bd. of Educ. (Ocean), GRC Complaint No. 2013-97 (Interim Order dated January 28, 2014); Carter v. Franklin Fire Dist. No. 2 (Somerset), GRC Complaint No. 2012-05 (Final Decision dated June 26, 2012).
2. The Custodian has borne his burden of proof that he lawfully denied access to the Complainant's April 28, 2015, September 16, 2015 OPRA request No. 1, item Nos. 4 and 5, and the September 16, 2015 OPRA request No. 2, item Nos. 1, 2, and 3 based on the Custodian's certified statements that no responsive records exist. N.J.S.A. 47:1A-6; see Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005).
3. The Custodian unlawfully denied access to the field trip lists and requests responsive to the Complainant's September 16, 2015 OPRA request No. 1, item Nos. 2 and 3. N.J.S.A. 47:1A-6. Specifically, disclosing portions of the responsive records raises safety and security issues that pose a threat to students, staff, chaperones, and the public at trip locations. However, such a concern is expressly limited to any information revealing a year-to-year cyclical pattern. N.J.S.A. 47:1A-1.1; WNBC-TV v. Allendale Bd. of Educ., et al, 2015 N.J. Super. Unpub LEXIS 1330 (June 4, 2015). Thus, the Custodian must disclose the responsive records, with redactions where absolutely necessary.
4. The Custodian may have unlawfully denied access to the Complainant's September 16, 2015 OPRA request No. 2, item No. 4. N.J.S.A. 47:1A-6. The facts of this complaint call into question whether a purchase order actually existed at the time of the Complainant's OPRA request. Thus, the Custodian must either provide the responsive purchase order for the 2014-2015 school calendars or certify that no record existed at the time of the Complainant's OPRA request.

5. **The Custodian shall comply with conclusion Nos. 3 and 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 1:4-4,⁷ to the Executive Director.⁸**
6. 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: Frank F. Caruso
Communications Specialist/Resource Manager

December 12, 2017⁹

⁷ "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."

⁸ 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.

⁹ This complaint, which was scheduled for adjudication at the December 19, 2017 and January 30, 2018 meetings, was tabled based on legal advice.