



**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**

**January 7, 2020 Government Records Council Meeting**

Arnav Sood  
Complainant

Complaint No. 2016-241

v.

West Windsor-Plainsboro School District (Mercer)  
Custodian of Record

At the January 7, 2020 public meeting, the Government Records Council (“Council”) considered the December 10, 2019 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 current Custodian complied with the Council’s November 12, 2019 Interim Order because he responded in the prescribed time frame delivering the responsive records and simultaneously provided certified confirmation of compliance to the Executive Director.
2. Although the Custodian unlawfully denied access to portions of the withheld records, she lawfully denied access to the remainder of the Complainant’s OPRA request. Additionally, the evidence of record does not indicate that the Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, 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 7<sup>th</sup> Day of January 2020

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: January 9, 2020**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director  
January 7, 2020 Council Meeting**

**Arnav Sood<sup>1</sup>  
Complainant**

**GRC Complaint No. 2016-241**

v.

**West Windsor-Plainsboro School District (Mercer)<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** All internal correspondence, records, minutes, or other materials pertaining to the Middle School Science Bowl (“MSSB”). Specific individuals are Science Supervisor Richard Stec, GMS Principal Lamont Thomas, and CMS Principal Shauna Carter.

**Custodian of Record:** Geraldine Hutner<sup>3</sup>

**Request Received by Custodian:** August 22, 2016

**Response Made by Custodian:** August 26, 2016

**GRC Complaint Received:** August 30, 2016

**Background**

**November 12, 2019 Council Meeting:**

At its November 12, 2019 public meeting, the Council considered the October 30, 2019 *In Camera* 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 GRC must conduct an *in camera* review of the redacted e-mails chains, to determine the validity of the Custodian’s assertion that the redactions were valid under OPRA as protecting advisory, consultative or deliberative material. N.J.S.A. 47:1A-1.1. See Paff v. N.J. Dep’t of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005).
2. **The Custodian shall deliver<sup>4</sup> to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see conclusion No. 1 above), nine (9) copies of**

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

<sup>2</sup> Represented by Eric L. Harrison, Esq., of Methfessel & Werbel, P.C. (Edison, NJ).

<sup>3</sup> The current Custodian of Record is Patrick Duncan.

<sup>4</sup> The *in camera* records may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives them by the deadline.

**the redacted records, a document or redaction index<sup>5</sup>, as well as a legal certification from the Custodian, in accordance with N.J. Court Rules, R. 1:4-4,<sup>6</sup> that the records provided are the records requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**

3. 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 November 14, 2019, the Council distributed its Interim Order to all parties. On November 15, 2019, the Counsel for the Custodian responded to the Council's Interim Order. Therein, both Counsel and the current Custodian provided certifications as well as copies of the records provided to the Complainant. Counsel certified that the Custodian relied upon his advice in redacting the records at issue, and maintained that she did not knowingly and willfully violated OPRA.

The current Custodian certified that on November 15, 2019, he provided the copies of records to the Complainant in accordance with the Council's Interim Order, as well as a certified confirmation of compliance.

#### Analysis

##### Compliance

At its November 12, 2019 meeting, the Council ordered the Custodian to provide the Complainant with the responsive records as amended and to submit certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4, to the Executive Director. On November 12, 2019, 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 November 21, 2019.

On November 15, 2019, the first (1<sup>st</sup>) business day after receipt of the Council's Order, the Custodian's Counsel responded to the GRC, certifying that responsive records as amended were provided to the Complainant that same day. The Counsel also included a certification from himself as well as a certified confirmation of compliance from the current Custodian.

Therefore, the current Custodian complied with the Council's November 12, 2019 Interim Order because he responded in the prescribed time frame delivering the responsive records and simultaneously provided certified confirmation of compliance to the Executive Director.

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<sup>5</sup> The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

<sup>6</sup> "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

## **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 (*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)).

Although the Custodian unlawfully denied access to portions of the withheld records, she lawfully denied access to the remainder of the Complainant’s OPRA request. Additionally, the evidence of record does not indicate that the Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, 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 Executive Director respectfully recommends the Council find that:

1. The current Custodian complied with the Council’s November 12, 2019 Interim Order because he responded in the prescribed time frame delivering the responsive records and simultaneously provided certified confirmation of compliance to the Executive Director.
2. Although the Custodian unlawfully denied access to portions of the withheld records, she lawfully denied access to the remainder of the Complainant’s OPRA request. Additionally, the evidence of record does not indicate that the Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, 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: Samuel A. Rosado  
Staff Attorney

December 10, 2019



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**

**November 12, 2019 Government Records Council Meeting**

Arnav Sood  
Complainant

Complaint No. 2016-241

v.

West Windsor-Plainsboro School District (Mercer)  
Custodian of Record

At the November 12, 2019 public meeting, the Government Records Council (“Council”) considered the September 17, 2019 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 Custodian complied with the Council’s January 31, 2019 Interim Order because she responded in the prescribed time frame providing records for *in camera* review and simultaneously provided certified confirmation of compliance to the Council Staff.
2. Excepting those e-mails identified as student records under N.J.A.C. 6A:32-2.1, the Custodian unlawfully denied access to the sender, recipients, date, time, subject, and salutations (where applicable) contained within the requested e-mails. See Ray v. Freedom Acad. Charter Sch. (Camden), GRC Complaint No. 2009-185 (Interim Order dated August 24, 2010); L.R. v. Camden City Pub. Sch. Dist., 452 N.J. Super. 56 (App. Div. 2017), aff’d, 2019 N.J. LEXIS 988 (N.J. 2019). Thus, the Custodian must disclose these portions of the responsive e-mails to the Complainant.
3. **On the basis of the Council’s determination in this matter, the Custodian shall comply with the Council’s Findings of the *In Camera* Examination set forth in the above table and conclusion No. 2 within five (5) business days from receipt of this Order. Further, the Custodian shall simultaneously deliver<sup>1</sup> certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,<sup>2</sup> to the Executive Director.<sup>3</sup>**

<sup>1</sup> The certified confirmation of compliance, including supporting documentation, may be sent overnight mail, regular mail, e-mail, facsimile, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives it by the deadline.

<sup>2</sup> "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

<sup>3</sup> Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant, but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

4. 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 12<sup>th</sup> Day of November 2019

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 14, 2019**



**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

***In Camera* Findings and Recommendations of the Executive Director  
November 12, 2019 Council Meeting**

**Arnav Sood<sup>1</sup>  
Complainant**

**GRC Complaint No. 2016-241**

v.

**West Windsor-Plainsboro School District (Mercer)<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** All internal correspondence, records, minutes, or other materials pertaining to the Middle School Science Bowl (“MSSB”). Specific individuals are Science Supervisor Richard Stec, GMS Principal Lamont Thomas, and CMS Principal Shauna Carter.

**Custodian of Record:** Geraldine Hutner

**Request Received by Custodian:** August 22, 2016

**Response Made by Custodian:** August 26, 2016

**GRC Complaint Received:** August 30, 2016

**Records Submitted for *In Camera* Examination:** Twenty-seven (27) pages of records containing redactions, and forty (40) pages withheld entirely from access.

**Background**

**January 31, 2019 Council Meeting:**

At its January 31, 2019 public meeting, the Council considered the December 11, 2018 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 GRC must conduct an *in camera* review of the redacted e-mails chains, to determine the validity of the Custodian’s assertion that the redactions were valid under OPRA as protecting advisory, consultative or deliberative material. N.J.S.A. 47:1A-1.1. See Paff v. N.J. Dep’t of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005).
2. **The Custodian shall deliver<sup>3</sup> to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see conclusion No. 1 above), nine (9) copies of the redacted records, a document or redaction index<sup>4</sup>, as well as a legal certification from the Custodian,**

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

<sup>2</sup> Represented by Eric L. Harrison, Esq., of Methfessel & Werbel, P.C. (Edison, NJ).

<sup>3</sup> The *in camera* records may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives them by the deadline.

<sup>4</sup> The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

**in accordance with N.J. Court Rules, R. 1:4-4,<sup>5</sup> that the records provided are the records requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**

3. 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 February 4, 2019, the Council distributed its Interim Order to all parties. On February 8, 2019, the Custodian responded to the Council's Interim Order. The Custodian provided nine (9) redacted and unredacted copies of the records provided to the Complainant, as well as nine (9) copies of the records withheld in their entirety. The Custodian also provided a certification and document index.

The Custodian asserted that the redactions were justified to protect student information as well as advisory, consultative and deliberative ("ACD") material. The Custodian also asserted that those records withheld entirely comprised solely of ACD material.

#### Analysis

#### Compliance

At its January 31, 2019 meeting, the Council ordered the Custodian to provide nine (9) redacted and unredacted copies of the requested records, nine (9) copies of the records withheld entirely, as well as a document index. The Council also ordered the Custodian to simultaneously provide a certified confirmation of compliance to the Council Staff. On February 4, 2019, 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 February 11, 2019.

On February 8, 2019, the fourth (4<sup>th</sup>) business day after receipt of the Council's Order, the Custodian delivered nine (9) redacted and unredacted copies of the requested records provided to the Complainant, as well as nine (9) copies of the records withheld in their entirety. The Custodian also provided a certified confirmation of compliance and a document index.

Therefore, the Custodian complied with the Council's January 31, 2019 Interim Order because she responded in the prescribed time frame providing records for *in camera* review and simultaneously provided certified confirmation of compliance to the Council Staff.

Finally, the GRC briefly addresses the Custodian's method of redaction, whiting out exempted portions of each record, for guidance purposes. Specifically, the Council has found that whiting out as a method of redaction was not appropriate under OPRA. See Wolosky v. Andover Reg'l Sch. Dist. (Sussex), GRC Complaint No. 2009-94 (April 2010); Paff v. Borough of Manasquan (Monmouth), GRC Complaint No. 2009-281 (Interim Order dated March 29, 2011). Further, the Council has stressed that redaction methods should be "visually obvious" so as to show the "specific location of any redacted material." Wolosky, GRC 2009-94 at 13. Thus, going forward, the Custodian should avoid using the "white out"

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<sup>5</sup> "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

method of redaction as it is inappropriate under OPRA.

### **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. N.J.S.A. 47:1A-6.

### **Advisory, Consultative, and Deliberative Material**

OPRA provides that the definition of a government record “shall not include . . . inter-agency or intra-agency advisory, consultative, or deliberative [(“ACD”)] material.” When the exception is invoked, a governmental entity may “withhold documents that reflect advisory opinions, recommendations, and deliberations comprising part of a process by which governmental decisions and policies are formulated.” Educ. Law Ctr. v. N.J. Dep’t of Educ., 198 N.J. 274, 285 (2009) (citing NLRB v. Sears, Roebuck & Co., 421 U.S. 132 (1975)). The New Jersey Supreme Court has also ruled that a record that contains or involves factual components is entitled to deliberative-process protection under the exemption in OPRA when it was used in decision-making process *and* its disclosure would reveal deliberations that occurred during that process. Educ. Law Ctr., 198 N.J. at 274.

A custodian claiming an exception to the disclosure requirements under OPRA on that basis must initially satisfy two conditions: 1) the document must be pre-decisional, meaning that the document was generated prior to the adoption of the governmental entity's policy or decision; and 2) the document must reflect the deliberative process, which means that it must contain opinions, recommendations, or advice about agency policies. Id. at 286 (internal citations and quotations omitted). The key factor in this determination is whether the contents of the document reflect “formulation or exercise of . . . policy-oriented judgment or the process by which policy is formulated.” Id. at 295 (adopting the federal standard for determining whether material is “deliberative” and quoting Mapother v. Dep’t of Justice, 3 F.3d 1533, 1539 (D.C. Cir. 1993)). Once the governmental entity satisfies these two threshold requirements, a presumption of confidentiality is established, which the requester may rebut by showing that the need for the materials overrides the government's interest in confidentiality. Id. at 286-87.

### **Student Information/Records**

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).

The regulations of the State Board of Education and the Commissioner, in accordance with the New Jersey Pupil Rights Act (“NJPR”), 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).

While decided during the pendency of this complaint, L.R. v. Camden City Pub. Sch. Dist., 452 N.J. Super. 56 (App. Div. 2017), aff’d, 2019 N.J. LEXIS 988 (N.J. 2019) is instructive. In one of the four (4) consolidated cases, the trial court ordered the school district to disclose student records requested under OPRA, with redactions made to all personally identifying information (“PII”). The Appellate Division held that redacting PII from a document does not remove its classification as a “student record.” Id. at 83. The court found that “N.J.A.C. 6A:32-7.5(g)’s does not expressly incorporate FERPA’s provisions for the redaction of PII into the NJPRA or its regulations. Moreover, nothing in the NJPRA or its regulations states that sufficiently anonymized documents, with all PII removed, are no longer “student records” under N.J.A.C. 6A:32-1.” Id. at 85. Therefore, the court held that an OPRA requestor “cannot gain access to a student record unless the requestor satisfies one of the “[a]uthorized” categories listed in N.J.A.C. 6A:32-7.5(e)(1) through (16).” Id. at 87.

The GRC conducted an *in camera* examination on the submitted record. The results of this examination are set forth in the following table:

<b>Record or Redaction Number</b>	<b>Record Name/Date</b>	<b>Description of Record or Redaction</b>	<b>Custodian’s Explanation/ Citation for Non-disclosure or Redactions</b>	<b>Findings of the <i>In Camera</i> Examination<sup>6</sup></b>
1.	E-mail dated 09/22/2015 (1pg.)	Internal e-mail communications regarding the decision-making process about the Science Bowl program dated 09/22/2015 to 08/19/2016 (40pgs.)	Inter-agency or intra-agency ACD material. <u>N.J.S.A. 47:1A-1.1.</u>  <b>Withheld Entirely.</b>	The e-mail explained the details surrounding the Science Bowl event and the differences between it and the “Science Olympiad.” There’s no request for advice or recommendation on school policy. <b>Therefore, the Custodian unlawfully withheld the record and must disclose same. <u>N.J.S.A. 47:1A-6.</u></b>
2.	E-mail chain dated	Internal e-mail communications	Inter-agency or intra-agency ACD	The e-mail explained the details surrounding the

<sup>6</sup> **Unless expressly identified for redaction, everything in the record shall be disclosed.** For purposes of identifying redactions, unless otherwise noted a paragraph/new paragraph begins whenever there is an indentation and/or a skipped space(s). The paragraphs are to be counted starting with the first whole paragraph in each record and continuing sequentially through the end of the record. If a record is subdivided with topic headings, renumbering of paragraphs will commence under each new topic heading. Sentences are to be counted in sequential order throughout each paragraph in each record. Each new paragraph will begin with a new sentence number. If only a portion of a sentence is to be redacted, the word in the sentence which the redaction follows or precedes, as the case may be, will be identified and set off in quotation marks. If there is any question as to the location and/or extent of the redaction, the GRC should be contacted for clarification before the record is redacted. The GRC recommends the redactor make a paper copy of the original record and manually “black out” the information on the copy with a dark colored marker, then provide a copy of the blacked-out record to the requester.

	09/22/2015 (1pg.)	regarding the decision-making process about the Science Bowl program dated 09/22/2015 to 08/19/2016 (40pgs.)	material. <u>N.J.S.A. 47:1A-1.1.</u>  <b>Withheld Entirely.</b>	Science Bowl event and the differences between it and the “Science Olympiad.” There’s no opinion on school policy regarding the Science Bowl contained in the body. <b>Therefore, the Custodian unlawfully withheld the record and must disclose same. <u>N.J.S.A. 47:1A-6.</u></b>
3.	E-mail chain dated 09/22/2015 (1pg.)	Internal e-mail communications regarding the decision-making process about the Science Bowl program dated 09/22/2015 to 08/19/2016 (40pgs.)	Inter-agency or intra-agency ACD material. <u>N.J.S.A. 47:1A-1.1.</u>  <b>Withheld Entirely.</b>	The bodies of the first two messages refer to clarifications made on a policy decision. Therefore, the Custodian lawfully denied access. <u>N.J.S.A. 47:1A-1.1.</u> <b>However, the Custodian unlawfully denied access to the remainder of the chain and must disclose same. <u>N.J.S.A. 47:1A-6.</u></b>
4.	E-mail chain dated 09/22/2015 (1pg.)	Internal e-mail communications regarding the decision-making process about the Science Bowl program dated 09/22/2015 to 08/19/2016 (40pgs.)	Inter-agency or intra-agency ACD material. <u>N.J.S.A. 47:1A-1.1.</u>  <b>Withheld Entirely.</b>	The 2 <sup>nd</sup> paragraph of the first e-mail contains inquiries on the status of the Science Bowl, therefore the Custodian lawfully denied access. <u>N.J.S.A. 47:1A-1.1.</u> <b>However, the Custodian unlawfully denied access to the remainder of the chain and must disclose same. <u>N.J.S.A. 47:1A-6.</u></b>
5.	E-mail chain dated 09/22/2015 (2pgs.)	Internal e-mail communications regarding the decision-making process about the Science Bowl program dated 09/22/2015 to 08/19/2016 (40pgs.)	Inter-agency or intra-agency ACD material. <u>N.J.S.A. 47:1A-1.1.</u>  <b>Withheld Entirely.</b>	The bodies of the first two messages pertain to the policy status of the Science Bowl at the school, therefore the Custodian lawfully denied access. <u>N.J.S.A. 47:1A-1.1.</u> <b>However, the Custodian unlawfully denied access to the remainder of the chain</b>

				<b>and must disclose same. N.J.S.A. 47:1A-6.</b>
6.	E-mail chain dated 09/22/2015 (2pgs.)	Internal e-mail communications regarding the decision-making process about the Science Bowl program dated 09/22/2015 to 08/19/2016 (40pgs.)	Inter-agency or intra-agency ACD material. <u>N.J.S.A. 47:1A-1.1.</u>  <b>Withheld Entirely.</b>	The body of the first e-mail does not contain ACD material, therefore the Custodian unlawfully denied access. <u>N.J.S.A. 47:1A-6.</u> <b>The remainder of the record is a duplicate of Record No. 5.</b>
7.	E-mail chain dated 09/28/2015 (2pgs.)	Internal e-mail communications regarding the decision-making process about the Science Bowl program dated 09/22/2015 to 08/19/2016 (40pgs.)	Inter-agency or intra-agency ACD material. <u>N.J.S.A. 47:1A-1.1.</u>  <b>Withheld Entirely.</b>	The body of the first e-mail does not contain ACD material, therefore the Custodian unlawfully denied access. <u>N.J.S.A. 47:1A-6.</u> <b>The remainder of the record is a duplicate of Record No. 6.</b>
8.	E-mail chain dated 10/05/2015 (1pg.)	Internal e-mail communications regarding the decision-making process about the Science Bowl program dated 09/22/2015 to 08/19/2016 (40pgs.)	Inter-agency or intra-agency ACD material. <u>N.J.S.A. 47:1A-1.1.</u>  <b>Withheld Entirely.</b>	The bodies of the three messages all discuss inquiries made regarding school policy on the Science Bowl. Therefore, the Custodian lawfully denied access. <u>N.J.S.A. 47:1A-1.1.</u>
9.	E-mail dated 10/05/2015 (1pg.)	Internal e-mail communications regarding the decision-making process about the Science Bowl program dated 09/22/2015 to 08/19/2016 (40pgs.)	Inter-agency or intra-agency ACD material. <u>N.J.S.A. 47:1A-1.1.</u>  <b>Withheld Entirely.</b>	The body of the e-mail seeks advice regarding inquiries made on school policy towards the Science Bowl. Therefore, the Custodian lawfully denied access. <u>N.J.S.A. 47:1A-1.1.</u>
10.	E-mail chain dated 10/05/2015 (1pg.)	Internal e-mail communications regarding the decision-making process about the Science Bowl program dated 09/22/2015 to 08/19/2016 (40pgs.)	Inter-agency or intra-agency ACD material. <u>N.J.S.A. 47:1A-1.1.</u>  <b>Withheld Entirely.</b>	The bodies of both messages all discuss inquiries made regarding school policy on the Science Bowl. Therefore, the Custodian lawfully denied access. <u>N.J.S.A. 47:1A-1.1.</u>

11.	E-mail chain dated 10/05/2015 (1pg.)	Internal e-mail communications regarding the decision-making process about the Science Bowl program dated 09/22/2015 to 08/19/2016 (40pgs.)	Inter-agency or intra-agency ACD material. <u>N.J.S.A. 47:1A-1.1.</u>  <b>Withheld Entirely.</b>	The bodies of all three messages discuss planning for a conference call pertaining to inquiries made regarding school policy on the Science Bowl. Therefore, the Custodian lawfully denied access. <u>N.J.S.A. 47:1A-1.1.</u>
12.	E-mail chain dated 10/05/2015 (1pg.)	Internal e-mail communications regarding the decision-making process about the Science Bowl program dated 09/22/2015 to 08/19/2016 (40pgs.)	Inter-agency or intra-agency ACD material. <u>N.J.S.A. 47:1A-1.1.</u>  <b>Withheld Entirely.</b>	The bodies of all three messages discuss planning for a conference call pertaining to inquiries made regarding school policy on the Science Bowl. Therefore, the Custodian lawfully denied access. <u>N.J.S.A. 47:1A-1.1.</u>
13.	E-mail chain dated 10/05/2015 (1pg.)	Internal e-mail communications regarding the decision-making process about the Science Bowl program dated 09/22/2015 to 08/19/2016 (40pgs.)	Inter-agency or intra-agency ACD material. <u>N.J.S.A. 47:1A-1.1.</u>  <b>Withheld Entirely.</b>	The bodies of each message in the chain discuss planning for a conference call pertaining to inquiries made regarding school policy on the Science Bowl. Therefore, the Custodian lawfully denied access. <u>N.J.S.A. 47:1A-1.1.</u>
14.	E-mail chain dated 10/05/2015 (2pgs.)	Internal e-mail communications regarding the decision-making process about the Science Bowl program dated 09/22/2015 to 08/19/2016 (40pgs.)	Inter-agency or intra-agency ACD material. <u>N.J.S.A. 47:1A-1.1.</u>  <b>Withheld Entirely.</b>	The bodies of each message in the chain discuss planning for a conference call pertaining to inquiries made regarding school policy on the Science Bowl. Therefore, the Custodian lawfully denied access. <u>N.J.S.A. 47:1A-1.1.</u>
15.	E-mail chain dated 10/05/2015 (2pgs.)	Internal e-mail communications regarding the decision-making process about the Science Bowl program dated	Inter-agency or intra-agency ACD material. <u>N.J.S.A. 47:1A-1.1.</u>  <b>Withheld Entirely.</b>	The bodies of each message in the chain discuss planning for a conference call pertaining to inquiries made regarding school policy on the Science Bowl. Therefore, the Custodian

		09/22/2015 to 08/19/2016 (40pgs.)		lawfully denied access. <u>N.J.S.A. 47:1A-1.1.</u>
16.	Announcement for a meeting to be held on 10/07/2015 (1pg.)	Internal e-mail communications regarding the decision-making process about the Science Bowl program dated 09/22/2015 to 08/19/2016 (40pgs.)	Inter-agency or intra-agency ACD material. <u>N.J.S.A. 47:1A-1.1.</u>  <b>Withheld Entirely.</b>	The message announces a date to discuss the school's policy on the Science Bowl, but does not contain ACD material on the policy itself. <b>Therefore, the Custodian unlawfully denied access to the message and must disclose same. <u>N.J.S.A. 47:1A-6.</u></b>
17.	E-mail chain dated 10/09/2015 (1pg.)	Internal e-mail communications regarding the decision-making process about the Science Bowl program dated 09/22/2015 to 08/19/2016 (40pgs.)	Inter-agency or intra-agency ACD material. <u>N.J.S.A. 47:1A-1.1.</u>  <b>Withheld Entirely.</b>	The bodies of both messages refer to a question and answer regarding the status of the Science Bowl participation amongst the school district. The messages do not contain ACD material on the policy itself. <b>Therefore, the Custodian unlawfully denied access to the e-mail chain and must disclose same. <u>N.J.S.A. 47:1A-6.</u></b>
18.	E-mail chain dated 11/04/2015 (1pg.)	Deliberative communications.	Inter-agency or intra-agency ACD material. <u>N.J.S.A. 47:1A-1.1.</u>	<b>In accordance with <u>L.R., 452 N.J. Super. at 83-87,</u> the entirety of the record is withheld from access.</b>
19.	E-mail chain dated 05/26/2016 (3pgs.)	Deliberative communications and student identifiers/student records.	Inter-agency or intra-agency ACD material and student records. <u>N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-9(a); N.J.A.C. 6A:32-7.5(g).</u>	<b>In accordance with <u>L.R., 452 N.J. Super. at 83-87,</u> the entirety of the record is withheld from access.</b>
20.	E-mail dated 08/05/2016 (1pg.)	Student identifiers/student records.	Student records. <u>N.J.S.A. 47:1A-9(a); N.J.A.C. 6A:32-7.5(g).</u>	<b>In accordance with <u>L.R., 452 N.J. Super. at 83-87,</u> the entirety of the record is withheld from access.</b>
21.	E-mail chain dated	Student identifiers/student records.	Student records. <u>N.J.S.A. 47:1A-</u>	<b>In accordance with <u>L.R., 452 N.J. Super. at 83-87,</u></b>



	08/05/2016 (2pgs.)		9(a); <u>N.J.A.C.</u> 6A:32-7.5(g).	<b>the entirety of the record is withheld from access.</b>
22.	E-mail chain dated 08/05/2016 (2pgs.)	Student identifiers/student records.	Student records. <u>N.J.S.A.</u> 47:1A-9(a); <u>N.J.A.C.</u> 6A:32-7.5(g).	<b>In accordance with <u>L.R.</u>, 452 <u>N.J. Super.</u> at 83-87, the entirety of the record is withheld from access.</b>
23.	E-mail chain dated 08/09/2016 (2pgs.)	Student identifiers/student records.	Student records. <u>N.J.S.A.</u> 47:1A-9(a); <u>N.J.A.C.</u> 6A:32-7.5(g).	<b>In accordance with <u>L.R.</u>, 452 <u>N.J. Super.</u> at 83-87, the entirety of the record is withheld from access.</b>
24.	E-mail chain dated 08/09/2016 (2pgs.)	Student identifiers/student records.	Student records. <u>N.J.S.A.</u> 47:1A-9(a); <u>N.J.A.C.</u> 6A:32-7.5(g).	<b>In accordance with <u>L.R.</u>, 452 <u>N.J. Super.</u> at 83-87, the entirety of the record is withheld from access.</b>
25.	E-mail chain dated 08/15/2016 (1pg.)	Student identifiers/student records.	Student records. <u>N.J.S.A.</u> 47:1A-9(a); <u>N.J.A.C.</u> 6A:32-7.5(g).	<b>In accordance with <u>L.R.</u>, 452 <u>N.J. Super.</u> at 83-87, the entirety of the record is withheld from access.</b>
26.	E-mail chain dated 08/15/2016 (1pg.)	Student identifiers/student records.	Student records. <u>N.J.S.A.</u> 47:1A-9(a); <u>N.J.A.C.</u> 6A:32-7.5(g).	<b>In accordance with <u>L.R.</u>, 452 <u>N.J. Super.</u> at 83-87, the entirety of the record is withheld from access.</b>
27.	E-mail chain dated 08/15/2016 (2pgs.)	Student identifiers/student records.	Student records. <u>N.J.S.A.</u> 47:1A-9(a); <u>N.J.A.C.</u> 6A:32-7.5(g).	<b>In accordance with <u>L.R.</u>, 452 <u>N.J. Super.</u> at 83-87, the entirety of the record is withheld from access.</b>
28.	E-mail dated 08/15/2016 (2pgs.)	Student identifiers/student records.	Student records. <u>N.J.S.A.</u> 47:1A-9(a); <u>N.J.A.C.</u> 6A:32-7.5(g).	<b>In accordance with <u>L.R.</u>, 452 <u>N.J. Super.</u> at 83-87, the entirety of the record is withheld from access.</b>
29.	E-mail dated 08/15/2016 (2pgs.)	Student identifiers/student records.	Student records. <u>N.J.S.A.</u> 47:1A-9(a); <u>N.J.A.C.</u> 6A:32-7.5(g).	<b>In accordance with <u>L.R.</u>, 452 <u>N.J. Super.</u> at 83-87, the entirety of the record is withheld from access.</b>
30.	E-mail chain dated 08/15/2016 (2pgs.)	N/A	N/A	<b>In accordance with <u>L.R.</u>, 452 <u>N.J. Super.</u> at 83-87, the entirety of the record is withheld from access.</b>
31.	E-mail chain dated 08/15/2016 (3pgs.)	Internal e-mail communications regarding the decision-making process about the Science Bowl program dated 09/22/2015 to 08/19/2016 (40pgs.)	Inter-agency or intra-agency ACD material. <u>N.J.S.A.</u> 47:1A-1.1.  <b>Withheld Entirely.</b>	The first two (2) e-mails discuss opinions and clarifications regarding a policy decision, and therefore are lawfully withheld from access. <u>N.J.S.A.</u> 47:1A-1.1. The remainder of the record is also withheld from access

				in accordance with <u>L.R.</u> , 452 <u>N.J. Super.</u> at 83-87.
32.	E-mail chain dated 08/15/2016 (3pgs.)	Internal e-mail communications regarding the decision-making process about the Science Bowl program dated 09/22/2015 to 08/19/2016 (40pgs.)	Inter-agency or intra-agency ACD material. <u>N.J.S.A.</u> 47:1A-1.1.  <b>Withheld Entirely.</b>	The first two (2) e-mails discuss opinions and clarifications regarding a policy decision, and therefore are lawfully withheld from access. <u>N.J.S.A.</u> 47:1A-1.1. The remainder of the record is also withheld from access in accordance with <u>L.R.</u> , 452 <u>N.J. Super.</u> at 83-87.
33.	E-mail chain dated 08/15/2016 (3 pgs.)	Internal e-mail communications regarding the decision-making process about the Science Bowl program dated 09/22/2015 to 08/19/2016 (40pgs.)	Inter-agency or intra-agency ACD material. <u>N.J.S.A.</u> 47:1A-1.1.  <b>Withheld Entirely.</b>	The first three (3) e-mails discuss opinions and clarifications regarding a policy decision, and therefore are lawfully withheld from access. <u>N.J.S.A.</u> 47:1A-1.1. The remainder of the record is also withheld from access in accordance with <u>L.R.</u> , 452 <u>N.J. Super.</u> at 83-87.
34.	E-mail chain dated 08/15/2016 (2pgs.)	Internal e-mail communications regarding the decision-making process about the Science Bowl program dated 09/22/2015 to 08/19/2016 (40pgs.)	Inter-agency or intra-agency ACD material. <u>N.J.S.A.</u> 47:1A-1.1.  <b>Withheld Entirely.</b>	The content of the e-mail chain consists of conversations between the Complainant and a member of the District. However, the record contains PII of a student. Therefore, in accordance with <u>L.R.</u> , 452 <u>N.J. Super.</u> at 83-87, the entirety of the record is lawfully withheld from access.
35.	E-mail chain dated 08/15/2016 (3pgs.)	Repetitive e-mails that were produced individually.	N/A	Although the Custodian did not offer an explanation, the record contains PII of a student. <b>Therefore, in accordance with <u>L.R.</u>, 452 <u>N.J. Super.</u> at 83-87, the entirety of the record is withheld from access.</b>
36.	E-mail chain dated	Repetitive e-mails that were produced individually.	N/A	Although the Custodian did not offer an explanation, the record

	08/15/2016 (3pgs.)			contains PII of a student. <b>Therefore, in accordance with L.R., 452 N.J. Super. at 83-87, the entirety of the record is withheld from access.</b>
37.	E-mail chain dated 08/17/2016 (4pgs.)	Deliberative communications and student identifiers/student records. Repetitive e-mails that were produced individually.	Inter-agency or intra-agency ACD material and student records. <u>N.J.S.A. 47:1A-1.1</u> ; <u>N.J.S.A. 47:1A-9(a)</u> ; <u>N.J.A.C. 6A:32-7.5(g)</u> .	The redacted body of the e-mail contains a request for advice on addressing an inquiry regarding school policy. Therefore, the Custodian lawfully redacted the record under the ACD exemption. <u>N.J.S.A. 47:1A-1.1</u> . However, the record contains PII of a student. <b>Therefore, in accordance with L.R., 452 N.J. Super. at 83-87, the entirety of the record is withheld from access.</b>
38.	E-mail chain dated 08/19/2016 (4pgs.)	Internal e-mail communications regarding the decision-making process about the Science Bowl program dated 09/22/2015 to 08/19/2016 (40pgs.)	Inter-agency or intra-agency ACD material. <u>N.J.S.A. 47:1A-1.1</u> .  <b>Withheld Entirely.</b>	The first two e-mails pertain to a request for advice on responding to the Complainant's inquiry on school policy, and a response given. Therefore, that portion of the chain is exempt from disclosure. <u>N.J.S.A. 47:1A-1.1</u> . However, the record contains PII of a student. Therefore, in accordance with <u>L.R., 452 N.J. Super. at 83-87</u> , the entirety of the record is lawfully withheld from access.
39.	E-mail chain dated 08/19/2016 (4pgs.)	Internal e-mail communications regarding the decision-making process about the Science Bowl program dated 09/22/2015 to 08/19/2016 (40pgs.)	Inter-agency or intra-agency ACD material. <u>N.J.S.A. 47:1A-1.1</u> .  <b>Withheld Entirely.</b>	The first three e-mails pertain to a request for advice on responding to the Complainant's inquiry on school policy, and a response given. Therefore, that portion of the chain is exempt from disclosure. <u>N.J.S.A. 47:1A-1A-1.1</u> . However, the record

				contains PII of a student. Therefore, in accordance with <u>L.R., 452 N.J. Super. at 83-87</u> , the entirety of the record is lawfully withheld from access.
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Additionally, consistent with N.J.S.A. 47:1A-5(g), if the custodian of a government record asserts that part of a particular record is exempt from public access pursuant to OPRA, the custodian must delete or excise from a copy of the record that portion which the custodian asserts is exempt from access and must promptly permit access to the remainder of the record. In prior decisions, the Council has routinely required disclosure of certain information contained within e-mails, to include sender, recipients, date, time, subject, and salutations (where applicable). See Ray v. Freedom Acad. Charter Sch. (Camden), GRC Complaint No. 2009-185 (Interim Order dated August 24, 2010); Verry v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2013-287 (Interim Order dated June 30, 2015). However, in accordance with FERPA, the names and e-mail addresses of any identified students should remain undisclosed.

Accordingly, excepting those e-mails identified as student records under N.J.A.C. 6A:32-2.1, the Custodian unlawfully denied access to the sender, recipients, date, time, subject, and salutations (where applicable) contained within the requested e-mails. See Ray, GRC 2009-185; and L.R., 452 N.J. Super. at 83-87. Thus, the Custodian must disclose these portions of the responsive e-mails to the Complainant.

**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 complied with the Council’s January 31, 2019 Interim Order because she responded in the prescribed time frame providing records for *in camera* review and simultaneously provided certified confirmation of compliance to the Council Staff.
2. Excepting those e-mails identified as student records under N.J.A.C. 6A:32-2.1, the Custodian unlawfully denied access to the sender, recipients, date, time, subject, and salutations (where applicable) contained within the requested e-mails. See Ray v. Freedom Acad. Charter Sch. (Camden), GRC Complaint No. 2009-185 (Interim Order dated August 24, 2010); L.R. v. Camden City Pub. Sch. Dist., 452 N.J. Super. 56 (App. Div. 2017), aff’d, 2019 N.J. LEXIS 988 (N.J. 2019). Thus, the Custodian must disclose these portions of the responsive e-mails to the Complainant.
3. **On the basis of the Council’s determination in this matter, the Custodian shall comply with the Council’s Findings of the *In Camera* Examination set forth in the above table and conclusion No. 2 within five (5) business days from receipt of this Order. Further, the**

**Custodian shall simultaneously deliver<sup>7</sup> certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,<sup>8</sup> to the Executive Director.<sup>9</sup>**

4. 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: Samuel A. Rosado  
Staff Attorney

September 17, 2019<sup>10</sup>

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<sup>7</sup> The certified confirmation of compliance, including supporting documentation, may be sent overnight mail, regular mail, e-mail, facsimile, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives it by the deadline.

<sup>8</sup> "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

<sup>9</sup> Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant, but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

<sup>10</sup> This complaint was prepared for adjudication at the Council's September 24, 2019 meeting, but was tabled for further review.



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PHILIP D. MURPHY  
Governor

LT. GOVERNOR SHEILA Y. OLIVER  
Commissioner

INTERIM ORDER

January 31, 2019 Government Records Council Meeting

Arnav Sood  
Complainant

Complaint No. 2016-241

v.

West Windsor-Plainsboro School District (Mercer)  
Custodian of Record

At the January 31, 2019 public meeting, the Government Records Council (“Council”) considered the January 22, 2019 Findings and Recommendations of the Council Staff and all related documentation submitted by the parties. The Council, by a majority vote, adopted the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The GRC must conduct an *in camera* review of the redacted e-mails chains, to determine the validity of the Custodian’s assertion that the redactions were valid under OPRA as protecting advisory, consultative or deliberative material. N.J.S.A. 47:1A-1.1. See Paff v. N.J. Dep’t of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005).
2. **The Custodian shall deliver<sup>1</sup> to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see conclusion No. 1 above), nine (9) copies of the redacted records, a document or redaction index<sup>2</sup>, as well as a legal certification from the Custodian, in accordance with N.J. Court Rules, R. 1:4-4,<sup>3</sup> that the records provided are the records requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council’s Interim Order.**
3. 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.

<sup>1</sup> The *in camera* records may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives them by the deadline.

<sup>2</sup> The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

<sup>3</sup> "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."



Interim Order Rendered by the  
Government Records Council  
On The 31<sup>st</sup> Day of January, 2019

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: February 4, 2019**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Council Staff  
January 31, 2019 Council Meeting**

**Arnav Sood<sup>1</sup>  
Complainant**

**GRC Complaint No. 2016-241**

v.

**West Windsor-Plainsboro School District (Mercer)<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** All internal correspondence, records, minutes, or other materials pertaining to the Middle School Science Bowl (“MSSB”). Specific individuals are Science Supervisor Richard Stec, GMS Principal Lamont Thomas, and CMS Principal Shauna Carter.

**Custodian of Record:** Geraldine Hutner  
**Request Received by Custodian:** August 22, 2016  
**Response Made by Custodian:** August 26, 2016  
**GRC Complaint Received:** August 30, 2016

**Background<sup>3</sup>**

**Request and Response:**

On August 20, 2016, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On August 26, 2016, the Custodian responded in writing, providing some responsive records with redactions made to student’s identities pursuant to the Family Educational Records Privacy Act (“FERPA”). The Custodian also stated that internal communications between administrators were exempt from disclosure under the deliberative process exemption. N.J.S.A. 47:1A-1.

**Denial of Access Complaint:**

On August 30, 2016, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that he submitted his request for communications and meeting minutes regarding the cancellation of the MSSB on August 20, 2016. The Complainant then asserted that he received responsive records on August 26, 2016.

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

<sup>2</sup> Represented by Eric L. Harrison, Esq., of Methfessel & Werbel, P.C. (Edison, NJ).

<sup>3</sup> The parties may have submitted additional correspondence or made additional statements/assertions in the submissions identified herein. However, the Council includes in the Findings and Recommendations of the Council Staff the submissions necessary and relevant for the adjudication of this complaint.



The Complainant objected to the Custodian's denial of access to records pursuant to the deliberative process privilege. The Complainant asserted that the reasoning is overly broad, as it could be used to exempt any intra-agency e-mail from disclosure. The Complainant contended that the privilege was only reserved for draft documents or documents that are part of a formal deliberation.

#### Statement of Information:<sup>4</sup>

On November 29, 2016, the Custodian filed a Statement of Information ("SOI"). The Custodian certified that she received the Complainant's OPRA request on August 22, 2016. The Custodian certified that she responded in writing on August 26, 2016, providing responsive records, with redactions made to some to protect student identification. The Custodian also certified that she denied access to communications between administrators pursuant to the deliberative process privilege, which were encompassed under OPRA as the exemption for records containing "inter-agency or intra-agency advisory, consultative, or deliberative material" ("ACD"). N.J.S.A. 47:1A-1.1. See Educ. Law Ctr. v. N.J. Dep't of Educ., 198 N.J. 274, 284 (2009).

The Custodian asserted that the requested records were exempt because they involved communications between administrators regarding the MSSB and generated prior to the West Windsor-Plainsboro School District's ("District") decision to not reinstate the activity. The Custodian contended that the communications contained the administrators' opinions, recommendations, and advice regarding the decision, and therefore satisfy the elements required to invoke the deliberative process privilege. Ciesla v. N.J. Dep't of Health and Senior Servs., 429 N.J. Super. 127, 138 (App. Div. 2012).

#### Additional Submissions

On December 6, 2016, the Complainant provided the GRC with a response to the Custodian's SOI. The Complainant objected to the Custodian's redactions, referencing Congress's intent that exemptions under the Freedom of Information Act ("FOIA") were not mandatory.<sup>5</sup>

### Analysis

#### 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.

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<sup>4</sup> On October 4, 2016, the matter was referred to mediation. On or before November 23, 2016, the matter was referred back from mediation.

<sup>5</sup> The Complainant referenced FOIA throughout his response; however it should be noted that FOIA is a federal statute pertaining to access to federal documents and is therefore inapplicable in the instant matter.

In Paff v. N.J. Dep't of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005), the complainant appealed a final decision of the Council<sup>6</sup> that accepted the custodian's legal conclusion for the denial of access without further review. The Appellate Division noted that "OPRA contemplates the GRC's meaningful review of the basis for an agency's decision to withhold government records . . . . When the GRC decides to proceed with an investigation and hearing, the custodian may present evidence and argument, but the GRC is not required to accept as adequate whatever the agency offers." Id. The Court stated that:

[OPRA] also contemplates the GRC's *in camera* review of the records that an agency asserts are protected when such review is necessary to a determination of the validity of a claimed exemption. Although OPRA subjects the GRC to the provisions of the 'Open Public Meetings Act,' N.J.S.A. 10:4-6 to -21, it also provides that the GRC 'may go into closed session during that portion of any proceeding during which the contents of a contested record would be disclosed.' N.J.S.A. 47:1A-7(f). This provision would be unnecessary if the Legislature did not intend to permit *in camera* review.

[Id. at 355.]

Further, the Court found that:

We hold only that the GRC has and should exercise its discretion to conduct *in camera* review when necessary to resolution of the appeal . . . There is no reason for concern about unauthorized disclosure of exempt documents or privileged information as a result of *in camera* review by the GRC. The GRC's obligation to maintain confidentiality and avoid disclosure of exempt material is implicit in N.J.S.A. 47:1A-7(f), which provides for closed meeting when necessary to avoid disclosure before resolution of a contested claim of exemption.

[Id.]

In the instant matter, the Custodian asserted that the redactions at issue were made under the deliberative process privilege. N.J.S.A. 47:1A-1.1. The Custodian provided descriptions of the responsive records and the information redacted as part of the SOI.

Notwithstanding the Custodian's description of the responsive records, further is necessary to determine whether all withheld and redacted records reasonably fall within the ACD exemptions. The GRC must thus review same in order to determine the full applicability of exemptions. Such an action is not uncommon, as the GRC will routinely perform an *in camera* review in similar circumstances. See Pouliot v. N.J. Dep't of Educ., GRC Complaint No. 2015-281 (Interim Order dated January 31, 2017).

Therefore, the GRC must conduct an *in camera* review of the redacted e-mails chains, to determine the validity of the Custodian's assertion that the redactions were valid under OPRA as protecting ACD material. N.J.S.A. 47:1A-1.1. See Paff, 379 N.J. Super. at 346.

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<sup>6</sup> Paff v. N.J. Dep't of Labor, Bd. of Review, GRC Complaint No. 2003-128 (October 2005).

## **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 GRC must conduct an *in camera* review of the redacted e-mails chains, to determine the validity of the Custodian's assertion that the redactions were valid under OPRA as protecting advisory, consultative or deliberative material. N.J.S.A. 47:1A-1.1. See Paff v. N.J. Dep't of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005).
2. **The Custodian shall deliver<sup>7</sup> to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see conclusion No. 1 above), nine (9) copies of the redacted records, a document or redaction index<sup>8</sup>, as well as a legal certification from the Custodian, in accordance with N.J. Court Rules, R. 1:4-4,<sup>9</sup> that the records provided are the records requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**
3. 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.

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<sup>7</sup> The *in camera* records may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives them by the deadline.

<sup>8</sup> The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

<sup>9</sup> "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

<sup>10</sup> The matter was originally scheduled for the December 18, 2018 Meeting but was tabled due to a lack of quorum.