



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

September 24, 2019 Government Records Council Meeting

Nicholas Patrick DiFelice
Complainant

Complaint No. 2017-232

v.

Monroe Township Public Schools (Gloucester)
Custodian of Record

At the September 24, 2019 public meeting, the Government Records Council (“Council”) considered the September 17, 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 Custodian complied with the Council’s August 27, 2019 Interim Order because she responded in the prescribed time frame disclosing the responsive Sullivan e-mails to the Complainant and including a document index reflecting the specific lawful bases for redactions contained therein. Further, the Custodian simultaneously provided certified confirmation of compliance to the Executive Director.
2. The Custodian’s failure to respond in a timely manner resulted in a “deemed” denial of access. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). Further, the Custodian unlawfully denied access to the responsive Sullivan e-mails. N.J.S.A. 47:1A-6. However, the Custodian previously disclosed all remaining responsive e-mails to the Complainant. Also, the Custodian complied with the Council’s August 27, 2019 Interim Order. 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 24th Day of September 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: September 27, 2019

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
September 24, 2019 Council Meeting**

**Nicholas Patrick DiFelice¹
Complainant**

GRC Complaint No. 2017-232

v.

**Monroe Township Public Schools (Gloucester)²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of e-mails to or from any Monroe Township Board of Education (“BOE”) members, Charles Earling, Ralph Ross, David Sullivan, the Custodian, and John Armano from October 1, 2015 through October 9, 2017 containing the keyword “mold.”

Custodian of Record: Lisa Schulz

Request Received by Custodian: November 27, 2017

Response Made by Custodian: December 8, 2017

GRC Complaint Received: December 8, 2017

Background

August 27, 2019 Council Meeting:

At its August 27, 2019 public meeting, the Council considered the August 20, 2019 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. The Custodian did not bear her burden of proof that she timely responded to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian’s failure to respond in writing to the Complainant’s OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).
2. The Custodian unlawfully denied access to the Sullivan e-mails. N.J.S.A. 47:1A-6. Specifically, the Custodian identified that the Sullivan e-mails existed and were under review. However, the evidence of record does not support any disclosure following the

¹ No legal representation listed on record.

² Represented by Lauren E. Tedesco, Esq., of Capehart, Scatchard, P.A. (Mt. Laurel, NJ).

Statement of Information filing. Thus, the Custodian shall disclose the responsive e-mails and, if applicable, provide to the Complainant a specific lawful basis for deeming any record exempt from access in part or whole. Alternatively, if the Custodian disclosed the Sullivan e-mails during the pendency of this complaint, she must certify to this fact and supply supporting documentation of her response.

3. **The Custodian shall comply with conclusion No. 2 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, if applicable. Further, the Custodian shall simultaneously deliver³ certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,⁴ to the Executive Director.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.

Procedural History:

On August 28, 2019, the Council distributed its Interim Order to all parties. On September 5, 2019, the Custodian responded to the Council's Interim Order. Therein, the Custodian certified that she was providing to the Complainant all Sullivan e-mails in redacted form, as well as a redaction index. The Custodian affirmed that the redactions were exempt under multiple exemptions under N.J.S.A. 47:1A-1.1 as follows:

- Information which is a communication between a public agency and insurance carrier;
- Personal information;
- Attorney-client privileged material; and
- Emergency or security information, the disclosure of which would jeopardize the security of a building or persons therein.

Additional Submissions:

On September 8, 2019, the Complainant e-mailed the Government Records Council ("GRC") stating that he received a number of e-mails that were "heavily redacted." The Complainant asserted that he believed the Custodian engaged in a process of over-redacting

³ 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.

⁴ "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."

⁵ 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.

responsive records. The Complainant noted that he previously received similarly redacted records in response to past OPRA requests. The Complainant, however, stated that he would “argue that point another day.”

On September 10, 2019, the GRC e-mailed the Complainant seeking clarification of his e-mail. Specifically, the GRC asked the Complainant to clarify whether he intended to accept the Custodian’s compliance without further action. On September 12, 2019, the Complainant responded confirming that he was “willing to accept the [C]ustodian’s heavily redacted [e-mails] without further action.”

Analysis

Compliance

At its August 27, 2019 meeting, the Council ordered the Custodian to disclose all Sullivan e-mails, with a document index where applicable, or to certify that she had already done so including supporting documentation. Further, the Council ordered the Custodian to submit certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4, to the Executive Director. On August 28, 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 September 5, 2019.

On September 5, 2019, the fifth (5th) business day after receipt of the Council’s Order, the Custodian responded providing all Sullivan e-mails, with redactions, to the Complainant. The Custodian also provided a document index identifying a specific lawful basis for said redactions. Finally, the Custodian included certified confirmation of compliance to the Executive Director. Based on the forgoing, the evidence of record supports that the Custodian complied with the Council’s Order.

Therefore, the Custodian complied with the Council’s August 27, 2019 Interim Order because she responded in the prescribed time frame disclosing the responsive Sullivan e-mails to the Complainant and including a document index reflecting the specific lawful bases for redactions contained therein. Further, the Custodian simultaneously provided certified confirmation of compliance to the Executive Director.

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” method of redaction as it is inappropriate under OPRA.

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)).

In the matter before the Council, the Custodian’s failure to respond in a timely manner resulted in a “deemed” denial of access. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). Further, the Custodian unlawfully denied access to the responsive Sullivan e-mails. N.J.S.A. 47:1A-6. However, the Custodian previously disclosed all remaining responsive e-mails to the Complainant. Also, the Custodian complied with the Council’s August 27, 2019 Interim Order. 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 Custodian complied with the Council’s August 27, 2019 Interim Order because she responded in the prescribed time frame disclosing the responsive Sullivan e-mails to the Complainant and including a document index reflecting the specific lawful bases for redactions contained therein. Further, the Custodian simultaneously provided certified confirmation of compliance to the Executive Director.
2. The Custodian’s failure to respond in a timely manner resulted in a “deemed” denial of access. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). Further, the Custodian unlawfully

denied access to the responsive Sullivan e-mails. N.J.S.A. 47:1A-6. However, the Custodian previously disclosed all remaining responsive e-mails to the Complainant. Also, the Custodian complied with the Council's August 27, 2019 Interim Order. 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: Frank F. Caruso
Executive Director

September 17, 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

August 27, 2019 Government Records Council Meeting

Nicholas Patrick DiFelice
Complainant

Complaint No. 2017-232

v.

Monroe Township Public Schools (Gloucester)
Custodian of Record

At the August 27, 2019 public meeting, the Government Records Council (“Council”) considered the August 20, 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 did not bear her burden of proof that she timely responded to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian’s failure to respond in writing to the Complainant’s OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).
2. The Custodian unlawfully denied access to the Sullivan e-mails. N.J.S.A. 47:1A-6. Specifically, the Custodian identified that the Sullivan e-mails existed and were under review. However, the evidence of record does not support any disclosure following the Statement of Information filing. Thus, the Custodian shall disclose the responsive e-mails and, if applicable, provide to the Complainant a specific lawful basis for deeming any record exempt from access in part or whole. Alternatively, if the Custodian disclosed the Sullivan e-mails during the pendency of this complaint, she must certify to this fact and supply supporting documentation of her response.
3. **The Custodian shall comply with conclusion No. 2 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, if applicable. Further, the Custodian shall simultaneously deliver¹**

¹ 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.

certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,² to the Executive Director.³

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 27th Day of August 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: August 28, 2019

² "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."

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

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
August 27, 2019 Council Meeting**

**Nicholas Patrick DiFelice¹
Complainant**

GRC Complaint No. 2017-232

v.

**Monroe Township Public Schools (Gloucester)²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of e-mails to or from any Monroe Township Board of Education (“BOE”) members, Charles Earling, Ralph Ross, David Sullivan, the Custodian, and John Armano from October 1, 2015 through October 9, 2017 containing the keyword “mold.”

Custodian of Record: Lisa Schulz
Request Received by Custodian: November 27, 2017
Response Made by Custodian: December 8, 2017
GRC Complaint Received: December 8, 2017

Background³

Request:

On November 26, 2017 (a Sunday), the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On November 27, 2017, Confidential Secretary Michelle Caruso acknowledged receipt of the OPRA request.

Denial of Access Complaint:

On December 8, 2017, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that the Custodian failed to respond to the subject OPRA request in a timely manner.

Response:

On December 8, 2017, the Custodian responded in writing to the Complainant’s OPRA

¹ No legal representation listed on record.

² No legal representation listed on record.

³ 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.

Nicholas Patrick DiFelice v. Monroe Township Public Schools (Gloucester), 2017-232 – Findings and Recommendations of the Executive Director

request. The Custodian stated that the BOE began the process of amassing records through Information Technology (“IT”). The Custodian stated she accidentally failed to seek an extension of time. The Custodian stated that the Complainant would be receiving an e-mail containing responsive records collected as of December 7, 2017. The Custodian also noted that she was responsive to “all other 50 [OPRA] requests” submitted by the Complainant, as well as “the other 44 requests” submitted by third parties. The Custodian thus averred that her failure to respond in a timely manner here was not a willful act.

The Custodian sent a separate e-mail stating that this OPRA request appeared to be a duplicate of a third party OPRA request. The Custodian noted that if this were the case, no special service charge would be imposed. The Custodian thus stated that she would provide an update on December 11, 2017. On the same day, the Complainant e-mailed the Custodian identifying the third party requestor “to save [the Custodian] some time” in responding to the subject OPRA request.

On December 11, 2017, Ms. Caruso e-mailed the Complainant stating that the BOE was still redacting Mr. Sullivan’s e-mails (“Sullivan e-mails”) that were responsive to the request. Ms. Caruso stated that they would be forwarded “as soon as possible.” On December 14, 2017, the Complainant e-mailed Ms. Caruso asking if the Sullivan e-mails that were being redacted were the same as those responsive to the third party OPRA request.

Statement of Information:

On December 20, 2017, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on November 27, 2017. The Custodian certified that her search included forwarding the OPRA request to IT to perform a search. The Custodian affirmed that during that search, the BOE determined the request was a duplicate of a third party OPRA request. The Custodian certified that IT retrieved the 2,529 e-mails provided in response to the third party OPRA request and loaded them onto a BOE laptop. The Custodian certified that she responded in writing on December 8, 2017 and again on December 11, 2017 disclosing multiple e-mails that were redacted for exempt information. N.J.S.A. 47:1A-1; N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-9; N.J.S.A. 10:4-12(b).

The Custodian argued that her failure to respond within the statutory time frame was “simply missed.” The Custodian noted that she received 104 OPRA requests between October 10, 2017 and the filing of this complaint; the Complainant accounted for 52 of those requests. The Custodian noted that the subject OPRA request was one of two (2) requests⁴ submitted by the Complainant in the same e-mail. The Custodian contended that although the number of requests has become a disruption for the BOE, she routinely responded in a timely manner to each request to this point. The Custodian contended that, notwithstanding the timeliness issue, the Complainant received multiple responsive records on December 11, 2017, except for the Sullivan e-mails that were still under review.

⁴ The other OPRA request is the subject of DiFelice v. Monroe Twp. Pub. Sch. (Gloucester), GRC Complaint No. 2017-232, being adjudicated concurrently with this complaint.
Nicholas Patrick DiFelice v. Monroe Township Public Schools (Gloucester), 2017-232 – Findings and Recommendations of the Executive Director

Analysis

Timeliness

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

The Complainant filed the instant complaint contending that the Custodian failed to timely respond to the subject OPRA request. On the same day as the filing of this complaint, the Custodian e-mailed the Complainant accepting that she failed to timely respond, but that the BOE was working on fulfilling the subject OPRA request. In the SOI, the Custodian confirmed her failure to respond timely, asserting that a response was "simply missed." Thus, the evidence of record confirms a "deemed" denial occurred here.

Therefore, the Custodian did not bear her burden of proof that she timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley, GRC 2007-11.

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.

In the instant complaint, the Custodian disclosed multiple e-mails with redactions⁶ to the Complainant on December 11, 2017. However, the Custodian also noted that the BOE was still reviewing the Sullivan e-mails. Thereafter, the Custodian certified in the SOI that the BOE was still reviewing the Sullivan e-mails, but provided no date on which she would provide them to the Complainant. Further, there is no evidence in the record to support that the Custodian disclosed

⁵ A custodian's written response either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, even if said response is not on the agency's official OPRA request form, is a valid response pursuant to OPRA.

⁶ The GRC declines to address the redactions because the Complainant did not raise the issue during the pendency of this complaint.

Nicholas Patrick DiFelice v. Monroe Township Public Schools (Gloucester), 2017-232 – Findings and Recommendations of the Executive Director

these e-mails at any point after filing the SOI. For this reason, the evidence indicates that an unlawful denial of access occurred: the Custodian identified potential disclosable records but failed to either disclose them, in part or whole, or deny access under a specific lawful basis.

Accordingly, the Custodian unlawfully denied access to the Sullivan e-mails. N.J.S.A. 47:1A-6. Specifically, the Custodian identified that the Sullivan e-mails existed and were under review. However, the evidence of record does not support any disclosure following the SOI filing. Thus, the Custodian shall disclose the responsive e-mails and, if applicable, provide to the Complainant a specific lawful basis for deeming any record exempt from access in part or whole. Alternatively, if the Custodian disclosed the Sullivan e-mails during the pendency of this complaint, she must certify to this fact and supply supporting documentation of her response.

Knowing & Willful

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

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian did not bear her burden of proof that she timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).
2. The Custodian unlawfully denied access to the Sullivan e-mails. N.J.S.A. 47:1A-6. Specifically, the Custodian identified that the Sullivan e-mails existed and were under review. However, the evidence of record does not support any disclosure following the Statement of Information filing. Thus, the Custodian shall disclose the responsive e-mails and, if applicable, provide to the Complainant a specific lawful basis for deeming any record exempt from access in part or whole. Alternatively, if the Custodian disclosed the Sullivan e-mails during the pendency of this complaint, she must certify to this fact and supply supporting documentation of her response.
3. **The Custodian shall comply with conclusion No. 2 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, if applicable. Further, the Custodian shall simultaneously deliver⁷**

⁷ 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.

certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,⁸ to the Executive Director.⁹

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: Frank F. Caruso
Executive Director

August 20, 2019

⁸ "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."

⁹ 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.

Nicholas Patrick DiFelice v. Monroe Township Public Schools (Gloucester), 2017-232 – Findings and Recommendations of the Executive Director