



**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 26, 2021 Government Records Council Meeting**

Gregory Mascera, Esq.  
Complainant

Complaint No. 2018-61

v.

Verona Board of Education (Essex)  
Custodian of Record

At the January 26, 2021 public meeting, the Government Records Council (“Council”) considered the January 19, 2021 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 the Council should dismiss the complaint because the parties have agreed to a prevailing party fee amount, thereby negating the need for the Complainant to submit a fee application in accordance with N.J.A.C. 5:105-2.13. Therefore, no further adjudication is required.

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 26<sup>th</sup> Day of January 2021

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 28, 2021**



**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

*Prevailing Party Attorney's Fees*  
**Supplemental Findings and Recommendations of the Executive Director  
January 26, 2021 Council Meeting**

**Gregory Mascera, Esq.<sup>1</sup>  
Complainant**

**GRC Complaint No. 2018-61**

v.

**Verona Board of Education (Essex)<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:**

December 18, 2017 OPRA request: Copies of:

1. All e-mails from Dr. Rui Dionisio to any member of the Verona Board of Education (“BOE”) or staff and any member of the Verona High School (“VHS”) administration or staff “in any way relating to” the decision to place football coach Louis Racioppe on administrative leave.
2. All e-mails from Dr. Dionisio to any individual not covered under No. 1 above “in any way relating to” the decision to place Coach Racioppe on administrative leave.
3. All e-mail correspondence to Dr. Dionisio to any member of the BOE or staff and any member of the VHS administration or staff “in any way relating to” the decision to place football Coach Racioppe on administrative leave.
4. All e-mails to Dr. Dionisio to any individual not covered under No. 3 above “in any way relating to” the decision to place Coach Racioppe on administrative leave.
5. All e-mails from Josh Cogdill to any member of the BOE or staff and any member of the VHS administration or staff “in any way relating to” the decision to place football Coach Racioppe on administrative leave.
6. All e-mails from Mr. Cogdill to any individual not covered under No. 5 above “in any way relating to” the decision to place Coach Racioppe on administrative leave.
7. All e-mails to Josh Cogdill to any member of the BOE or staff and any member of the VHS administration or staff “in any way relating to” the decision to place football Coach Racioppe on administrative leave.
8. All e-mails to Mr. Cogdill to any individual not covered under No. 7 above “in any way relating to” the decision to place Coach Racioppe on administrative leave.

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<sup>1</sup> The Complainant, an attorney with Bannon, Rawding, McDonald & Mascera (Verona, NJ) represents Louis Racioppe.

<sup>2</sup> Represented by Michael Gross, Esq. of Kenney, Gross, Kovats, & Parton (Red Bank, NJ)

January 16, 2018 OPRA request: Copies of:

1. All student survey responses provided to the BOE on or about October 10, 2017 regarding the VHS football team or coaching staff.
2. All correspondence, written or electronic, to or from any BOE member regarding the VHS football team or coaching staff from January 1, 2014 through present not to include e-mails previously disclosed in response to a prior OPRA request.
3. All correspondence, written or otherwise, from Dr. Dionisio to or from any person regarding the VHS football team or coaching staff from January 1, 2014 through present not to include e-mails previously disclosed in response to a prior OPRA request.

**Custodian of Record:** Cheryl Nardino

**Request Received by Custodian:** December 18, 2017; January 16, 2018

**Response Made by Custodian:** December 18, 2017; January 16, 2018

**GRC Complaint Received:** April 9, 2018

### Background

November 10, 2020 Council Meeting:

At its November 10, 2020 public meeting, the Council considered the October 27, 2020 *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. Mr. Turner complied with the Council's April 28, 2020 Interim Order because he responded in the extended time frame submitting a complete *in camera* package to the GRC. Further, Mr. Turner submitted a certification detailing his reasons for denying access to the requested student surveys. Finally, Mr. Turner, simultaneously provided certified confirmation of compliance to the Executive Director.
2. **The *In Camera* Examination set forth above reveals the Custodian has lawfully denied access to redacted portions of the October 16 and November 1, 2017 e-mails and the responsive spreadsheet pursuant to N.J.S.A. 47:1A-6.**
3. The Custodian lawfully denied access to the responsive student surveys. N.J.S.A. 47:1A-6. Specifically, said surveys are "student records" as defined in N.J.A.C. 6A:32-2.1 and are thus exempt from disclosure under OPRA. N.J.S.A. 47:1A-9(a); L.R. v. Camden City Pub. Sch. Dist., 452 N.J. Super. 56 (App. Div. 2017). Additionally, the Complainant failed to prove that he fell within one of categories of individuals allowed to access "student records." N.J.A.C. 6A:32-7.5.
4. The Custodian violated OPRA by failing to respond to the Complainant's January 16, 2018 OPRA request item Nos. 2 and 3. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). Further, the Custodian's responses to the Complainant's December 18, 2017 and January 16, 2018 OPRA requests were insufficient. Notwithstanding, the Custodian

lawfully denied access to the redacted portions of the October 16 and November 1, 2017 e-mails, spreadsheet, and student surveys. N.J.S.A. 47:1A-9(a); N.J.A.C. 6A:32-7.5. Further, the Custodian ultimately disclosed those remaining records that existed to the Complainant on February 26 and May 3, 2018 respectively. Additionally, the evidence of record does not indicate that the Custodian's violations of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

5. The Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006). Additionally, a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Specifically, the filing of this complaint led directly to the Custodian disclosing outstanding e-mails responsive to the Complainant's January 16, 2018 OPRA request item Nos. 2 and 3. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. 432, and Mason, 196 N.J. 51. **Based on this determination, the parties shall confer in an effort to decide the amount of reasonable attorney's fees to be paid to Complainant within twenty (20) business days. The parties shall promptly notify the GRC in writing if a fee agreement is reached. If the parties cannot agree on the amount of attorney's fees, Complainant's Counsel shall submit a fee application to the Council in accordance with N.J.A.C. 5:105-2.13.**

#### Procedural History:

On November 12, 2020, the Council distributed its Interim Order to all parties. On December 9, 2020, the Custodian's Counsel e-mailed the Government Records Council ("GRC") advising that the parties agreed to a fee award. Counsel asked whether any further action would be required. On the same day, the GRC e-mailed the parties noting that the Council's Order required notification from both parties in order to proceed to final adjudication. The Complainant subsequently confirmed via e-mail that the parties agreed to a fee award.

#### Analysis

##### Prevailing Party Attorney's Fees

At its November 10, 2020 meeting, the Council determined that the Complainant was a prevailing party entitled to an award of reasonable attorney's fees. The Council thus ordered that the "parties shall confer in an effort to decide the amount of reasonable attorney's fees to be paid to Complainant within twenty (20) business days." The Council further ordered that the parties notify of any settlement prior to the expiration of the twenty (20) business day time frame. Finally, the Council ordered that, should the parties not reach an agreement, the Complainant's Counsel

would be required to “submit a fee application to the Council in accordance with N.J.A.C. 5:105-2.13.”

On November 12, 2020, the Council distributed its Interim Order to all parties; thus, the parties’ response was due by close of business on December 14, 2020. On December 9, 2020, both parties advised the GRC that they reached an agreement on a reasonable fee award.

Accordingly, the Council should dismiss the complaint because the parties have agreed to a prevailing party fee amount, thereby negating the need for the Complainant to submit a fee application in accordance with N.J.A.C. 5:105-2.13. Therefore, no further adjudication is required.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that the Council should dismiss the complaint because the parties have agreed to a prevailing party fee amount, thereby negating the need for the Complainant to submit a fee application in accordance with N.J.A.C. 5:105-2.13. Therefore, no further adjudication is required.

Prepared By: Frank F. Caruso  
Executive Director

January 19, 2021



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 10, 2020 Government Records Council Meeting**

Gregory Mascera, Esq.  
Complainant

Complaint No. 2018-61

v.

Verona Board of Education (Essex)  
Custodian of Record

At the November 10, 2020 public meeting, the Government Records Council (“Council”) considered the October 27, 2020 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. Mr. Turner complied with the Council’s April 28, 2020 Interim Order because he responded in the extended time frame submitting a complete *in camera* package to the GRC. Further, Mr. Turner submitted a certification detailing his reasons for denying access to the requested student surveys. Finally, Mr. Turner, simultaneously provided certified confirmation of compliance to the Executive Director.
2. **The *In Camera* Examination set forth above reveals the Custodian has lawfully denied access to redacted portions of the October 16 and November 1, 2017 e-mails and the responsive spreadsheet pursuant to N.J.S.A. 47:1A-6.**
3. The Custodian lawfully denied access to the responsive student surveys. N.J.S.A. 47:1A-6. Specifically, said surveys are “student records” as defined in N.J.A.C. 6A:32-2.1 and are thus exempt from disclosure under OPRA. N.J.S.A. 47:1A-9(a); L.R. v. Camden City Pub. Sch. Dist., 452 N.J. Super. 56 (App. Div. 2017). Additionally, the Complainant failed to prove that he fell within one of categories of individuals allowed to access “student records.” N.J.A.C. 6A:32-7.5.
4. The Custodian violated OPRA by failing to respond to the Complainant’s January 16, 2018 OPRA request item Nos. 2 and 3. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). Further, the Custodian’s responses to the Complainant’s December 18, 2017 and January 16, 2018 OPRA requests were insufficient. Notwithstanding, the Custodian lawfully denied access to the redacted portions of the October 16 and November 1, 2017 e-mails, spreadsheet, and student surveys. N.J.S.A. 47:1A-9(a); N.J.A.C. 6A:32-7.5. Further, the Custodian ultimately disclosed those remaining records that existed to the Complainant on February 26 and May 3, 2018 respectively. Additionally, the evidence of record does not indicate that the Custodian’s violations of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore,

the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

5. The Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006). Additionally, a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Specifically, the filing of this complaint led directly to the Custodian disclosing outstanding e-mails responsive to the Complainant's January 16, 2018 OPRA request item Nos. 2 and 3. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. 432, and Mason, 196 N.J. 51. **Based on this determination, the parties shall confer in an effort to decide the amount of reasonable attorney's fees to be paid to Complainant within twenty (20) business days. The parties shall promptly notify the GRC in writing if a fee agreement is reached. If the parties cannot agree on the amount of attorney's fees, Complainant's Counsel shall submit a fee application to the Council in accordance with N.J.A.C. 5:105-2.13.**

Interim Order Rendered by the  
Government Records Council  
On The 10<sup>th</sup> Day of November 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: November 12, 2020**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

***In Camera* Findings and Recommendations of the Executive Director  
November 10, 2020 Council Meeting**

**Gregory Mascera, Esq.<sup>1</sup>  
Complainant**

**GRC Complaint No. 2018-61**

v.

**Verona Board of Education (Essex)<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:**

December 18, 2017 OPRA request: Copies of:

1. All e-mails from Dr. Rui Dionisio to any member of the Verona Board of Education (“BOE”) or staff and any member of the Verona High School (“VHS”) administration or staff “in any way relating to” the decision to place football coach Louis Racioppe on administrative leave.
2. All e-mails from Dr. Dionisio to any individual not covered under No. 1 above “in any way relating to” the decision to place Coach Racioppe on administrative leave.
3. All e-mail correspondence to Dr. Dionisio to any member of the BOE or staff and any member of the VHS administration or staff “in any way relating to” the decision to place football Coach Racioppe on administrative leave.
4. All e-mails to Dr. Dionisio to any individual not covered under No. 3 above “in any way relating to” the decision to place Coach Racioppe on administrative leave.
5. All e-mails from Josh Cogdill to any member of the BOE or staff and any member of the VHS administration or staff “in any way relating to” the decision to place football Coach Racioppe on administrative leave.
6. All e-mails from Mr. Cogdill to any individual not covered under No. 5 above “in any way relating to” the decision to place Coach Racioppe on administrative leave.
7. All e-mails to Josh Cogdill to any member of the BOE or staff and any member of the VHS administration or staff “in any way relating to” the decision to place football Coach Racioppe on administrative leave.
8. All e-mails to Mr. Cogdill to any individual not covered under No. 7 above “in any way relating to” the decision to place Coach Racioppe on administrative leave.

January 16, 2018 OPRA request: Copies of:

1. All student survey responses provided to the BOE on or about October 10, 2017 regarding

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<sup>1</sup> The Complainant, an attorney with Bannon, Rawding, McDonald & Mascera (Verona, NJ) represents Louis Racioppe.

<sup>2</sup> Represented by Michael Gross, Esq. of Kenney, Gross, Kovats, & Parton (Red Bank, NJ)



- the VHS football team or coaching staff.
2. All correspondence, written or electronic, to or from any BOE member regarding the VHS football team or coaching staff from January 1, 2014 through present not to include e-mails previously disclosed in response to a prior OPRA request.
  3. All correspondence, written or otherwise, from Dr. Dionisio to or from any person regarding the VHS football team or coaching staff from January 1, 2014 through present not to include e-mails previously disclosed in response to a prior OPRA request.

**Custodian of Record:** Cheryl Nardino

**Request Received by Custodian:** December 18, 2017; January 16, 2018

**Response Made by Custodian:** December 18, 2017; January 16, 2018

**GRC Complaint Received:** April 9, 2018

**Records Submitted for *In Camera* Examination:** October 16 and November 1, 2017 e-mails and a spreadsheet attachment.

### Background

#### April 28, 2020 Council Meeting:

At its April 28, 2020 public meeting, the Council considered the April 21, 2020 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's failure to respond to the Complainant's clarified January 16, 2018 OPRA request item Nos. 2 and 3 within the renewed seven (7) business days resulted in a "deemed" denial of access. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i); Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2011-100 (Interim Order dated June 26, 2012). However, the GRC declines to order any additional actions because the Custodian ultimately disclosed those responsive e-mails on February 26 and [May] 3, 2018 respectively.
2. Because the Custodian failed to provide a specific lawful basis for redactions made to two (2) e-mails, as well as the denial of the spreadsheet attachment, her responses to the Complainant's December 18, 2017 OPRA request were insufficient. N.J.S.A. 47:1A-5(g); Paff v. Borough of Lavallette, GRC Complaint No. 2007-209 (Interim Order dated June 25, 2008). Additionally, the Custodian's response to the Complainant's January 16, 2018 OPRA request was legally insufficient because she failed to respond to each item contained therein. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i); Paff v. Willingboro Bd. of Educ. (Burlington), GRC Complaint No. 2007-272 (May 2008). See also Lenchitz v. Pittsgrove Twp. (Salem), GRC Complaint No. 2012-265 (Interim Order dated August 27, 2013).
3. The GRC must conduct an *in camera* review of the October 16 and November 1, 2017 e-mails, as well as the spreadsheet attachment responsive to the Complainant's

December 18, 2017 OPRA request to determine the validity of the Custodian's assertion that the record was exempt under OPRA. N.J.S.A. 47:1A-1.1. Paff v. N.J. Dep't of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005).

4. **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. 3 above), nine (9) copies of the redacted records (in the case of the e-mails), a document or redaction index<sup>4</sup>, as well as a legal certification from the Custodian, 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.**
5. The Custodian may have unlawfully denied access to the student surveys sought in the Complainant's January 16, 2018 OPRA request item No. 1. N.J.S.A. 47:1A-6 Thus, the Custodian must locate said surveys and either disclose them or provide a specific lawful basis for denying access along with a detailed explanation of the contents. However, should the Custodian determine that no responsive records exist, she must certify to this fact.
6. **The Custodian shall comply with conclusion No. 5 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 deliver<sup>6</sup> certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,<sup>7</sup> to the Executive Director.<sup>8</sup>**
7. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
8. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

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<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.

<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."

<sup>6</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>7</sup> "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

<sup>8</sup> Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

### Procedural History:

On April 29, 2020, the Council distributed its Interim Order to all parties. On the same day, Custodian's Counsel sent a letter to the Government Records Council ("GRC") advising that the Custodian was on long-term leave and unavailable. Counsel further stated that the BOE was working remotely due to COVID-19 and it was unlikely that the business office would be able to locate the relevant records within the prescribed time frame. Counsel thus requested a thirty (30) day extension of time to respond to the Council's Order. On May 5, 2020, the GRC responded granting an extension of time through June 4, 2020 given the circumstances presented by Counsel.

On June 4, 2020, Acting BOE Secretary Ernest Turner responded to conclusion Nos. 5, and 6 of the Council's Interim Order via e-mail. Therein, Mr. Turner stated that he was currently responsible for addressing OPRA requests. Mr. Turner certified that on this day, he responded denying access to the student surveys responsive to the Complainant's January 16, 2018 OPRA request item No. 1. Mr. Turner stated that the surveys constitute "student records" and the Complainant did not fall within any of the categories permitting access to them. N.J.A.C. 6A:32-2.1; N.J.A.C. 6A:32-7.5; L.R. v. Camden City Pub. Sch. Dist., 238 N.J. 547 (2019).<sup>9</sup>

On June 8, 2020, the GRC received Mr. Turner's response to conclusion Nos. 3 and 4 of the Council's Interim Order.<sup>10</sup> Mr. Turner certified that he was providing nine (9) redacted and unredacted copies of the October 16, and November 1, 2017 e-mails, as well as a numbered redaction index. Mr. Turner further certified that he was also providing nine (9) copies of the spreadsheet attachment. Mr. Turner reiterated that the redactions and spreadsheet constitute "student records" and the Complainant did not fall within any of the categories permitting access to them. N.J.A.C. 6A:32-2.1; N.J.A.C. 6A:32-7.5; L.R., 238 N.J. 547. Mr. Turner further argued that in light of L.R., the redactions included both e-mails were "overly generous."

### Analysis

#### Compliance

At its April 28, 2020 meeting, the Council ordered the Custodian to provide for *in camera* review nine (9) copies of an October 16, and November 1, 2017 e-mail (redacted and unredacted) and spreadsheet attachment. The Council further ordered the Custodian to disclose responsive student surveys, provide a specific lawful basis for denying access to them, or certify if no such records exist. The Council further ordered the Custodian to simultaneously deliver certified confirmation of compliance, in accordance with R. 1:4-4, to the Executive Director. On April 29, 2020, the Council distributed its Interim Order to all parties, providing the Custodian five (5) business days to comply with the terms of said Order. Thus, the Custodian's response was due by close of business on May 6, 2020.

On April 29, 2020, the same business day after receipt of the Council's Order, Custodian's Counsel sought and received an extension of time through June 4, 2020. On June 3, 2020,

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<sup>9</sup> Affirming L.R. v. Camden City Pub. Sch. Dist., 452 N.J. Super. 56 (App. Div. 2017) by equal division.

<sup>10</sup> Custodian's Counsel sent the Custodian's entire compliance package via UPS Ground on June 3, 2020. However, the GRC did not receive the package until June 8, 2020.

Custodian's Counsel caused Mr. Turner's *in camera* package to the GRC via UPS Ground. On June 4, 2020, the GRC received the first of two (2) responses from Mr. Turner. Therein, Mr. Turner certified that he was denying access to the responsive student surveys as "student records" under N.J.A.C. 6A:32-2.1 and pursuant to L.R., 238 N.J. 547. On June 8, 2020, the GRC received the second response from Mr. Turner. Therein, he certified that he was submitting the required nine (9) copies of the redacted and unredacted e-mails and spreadsheet attachment along with a document index. Mr. Turner argued that the redactions and spreadsheet were properly withheld N.J.A.C. 6A:32-2.1 and pursuant to L.R., 238 N.J. 547. Mr. Turner further provided certified confirmation of compliance to the Executive Director.

In determining whether Mr. Turner complied with the Council's Order, the GRC first notes that he addressed all issues required by the Order. Further, Mr. Turner delivered to the GRC all documents required for the *in camera* review. Notwithstanding, the GRC must address the timing of the *in camera* package because footnote No. 7 of the Council's decision clearly stated that the GRC must "physically receive[] by the deadline." It is clear that Counsel caused production of the *in camera* package on June 3, 2020 via UPS Ground. In utilizing delivery information resources available from UPS' website,<sup>11</sup> the package should have reached the GRC on June 4, 2020. However, given the current health crisis and its impact on operations within the GRC, it is plausible that the package timely arrived, but was not received until the following Monday. Based on these specific facts, the GRC believes it appropriate to exercise leniency here and accept the *in camera* package as received within time.

Therefore, Mr. Turner complied with the Council's April 28, 2020 Interim Order because he responded in the extended time frame submitting a complete *in camera* package to the GRC. Further, Mr. Turner submitted a certification detailing his reasons for denying access to the requested student surveys. Finally, Mr. Turner simultaneously provided certified confirmation of compliance to the Executive Director.

### **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.

OPRA also provides that:

The provisions of [OPRA] shall not abrogate any exemption of a public record or government record from public access heretofore made pursuant to [OPRA]; any other statute; resolution of either or both Houses of the Legislature; regulation promulgated under the authority of any statute or Executive Order of the Governor; Executive Order of the Governor; Rules of Court; any federal law; federal regulation; or federal order.

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<sup>11</sup> [https://www.ups.com/maps/results?loc=en\\_US](https://www.ups.com/maps/results?loc=en_US) (accessed August 11, 2020).

[N.J.S.A. 47:1A-9(a).]

The regulations of the State Board of Education and the Commissioner define a “student record” as “. . . information related to an individual student *gathered within or outside the school district and maintained within the school district*, regardless of the physical form in which it is maintained.” N.J.A.C. 6A:32-2.1 (emphasis added). The regulations of the State Board of Education and the Commissioner of Education provide that “[o]nly authorized organizations, agencies or persons as defined herein shall have access to student records . . .” to include “persons from outside the school if they have written consent of the parent . . .” N.J.A.C. 6A:32-7.5(e)(14). 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). To this end, the Council has looked to these exceptions in determining whether a complainant can access “student records” in part or whole under OPRA. See *i.e.* Martinez v. Edison Bd. of Educ. (Middlesex), GRC Complaint No. 2014-126 (May 2015); but see Inzelbuch v. Lakewood Bd. of Educ. (Ocean), GRC Complaint No. 2014-92 (September 2014).

More recently, the Appellate Division addressed OPRA and the disclosure of “student records” in L.R. v. Camden City Pub. Sch. Dist., 452 N.J. Super. 56 (App. Div. 2017). 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 [New Jersey Pupil Records Act (“NJPR”) or its regulations. Moreover, nothing in the NJPR 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.

The court further discussed the interplay between the NJPR, FERPA and OPRA:

It is reasonable to conclude that N.J.A.C. 6A:32-7.5(g) centrally concerns functionality—a district’s *processing* of student record requests from an authorized person or organization. See K.L., supra, 423 N.J. Super. at 350, 32 A.3d 1136 (“In providing access to school records in accordance with N.J.A.C. 6A:32-7.5, school districts must also comply with the requirements of OPRA and FERPA, N.J.A.C. 6A:32-7.5(g).”). For instance, if a school district receives an OPRA request from an authorized person or organization listed under N.J.A.C. 6A:32-7.5(e), then it must process that request in compliance with OPRA and FERPA requirements. Nothing in the plain language of N.J.A.C. 6A:32-7.5(g), however, supersedes or nullifies the limitations of “authorized” parties, as set forth at N.J.A.C. 6A:32-7.5(a) and (e). Hence, we agree with the judge in the Hillsborough case that a 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 86-87 (emphasis in original).]<sup>12</sup>

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<sup>12</sup> The Supreme Court of New Jersey subsequently affirmed by equal division noting that “N.J.A.C. 6A:32-7.5(g) confirms that individuals and entities may request student records in accordance with OPRA’s provisions, and that Gregory Mascera, Esq. v. Verona Board of Education (Essex), 2018-61 – *In Camera* Findings and Recommendations of the Executive Director

### In Camera Review:

In this matter, the Council ordered the Custodian to provide for an *in camera* review copies of two (2) redacted and unredacted e-mails, as well as a spreadsheet. Having received these records, the GRC is able to access the content of the e-mail redactions and the overall content contained in the spreadsheet sought by the Complainant. Having reviewed the records received from Mr. Turner, the GRC is satisfied that the Custodian lawfully denied access to both the redacted portions of the e-mails, as well as the spreadsheet.

Regarding the e-mail redactions, the GRC agrees with Mr. Turner that the Custodian provided more access than was required per L.R., 452 N.J. Super. 56. This is because the e-mails fall within the broad definition of a “student record.” N.J.A.C. 6A:31-1. The e-mails in question were sent by parents of football team players about the BOE’s handling of the head coach, who is represented by the Complainant. Those e-mails clearly identify the students involved and thus are “student records” exempt from disclosure under OPRA and the Complainant has not met any of the exceptions contained within N.J.A.C. 6A:31-7.5.

Regarding the spreadsheet, same is comprised of what appears to be a database coalescing the student survey responses into one document. That spreadsheet includes the list of questions asked to each student, the employee that conducted the survey, the students who were interviewed, their grade and student ID number, corresponding answers to the survey questions, and additional notes regarding expounding on those responses.

Accordingly, the redacted portions of the responsive October 16 and November 1, 2017 e-mails, as well as the entirety of the responsive spreadsheet, are exempt from disclosure as “student records” under OPRA. N.J.S.A. 47:1A-9(a); N.J.A.C. 6A:31-7.5; L.R., 452 N.J. Super. 56. Thus, the Custodian lawfully denied access to these records under OPRA. N.J.S.A. 47:1A-6.

### Student Surveys:

The Council also ordered the Custodian to either: 1) disclose the responsive student surveys; 2) provide a specific lawful basis for denying access to them; or 3) certify if no such records exist. Mr. Turner responded to the Council’s Interim Order stating that the surveys in question constituted “student records” exempt from access under the NJPRA. N.J.A.C. 6A:32-2.1. Mr. Turner further certified that the Complainant did not provide any evidence that he fell within the categories of individuals “permitted” to access same. N.J.A.C. 6A:32-7.5.

Having reviewed the argument of the Custodian, and in determining that the spreadsheet is composed of information from the surveys in question, it is obvious that same are “student records” not subject to access under OPRA. Specifically, these surveys asked student athletes participating in football several questions about coaching staff’s treatment of them during practices and games. They also likely include the identifiable student information contained in the spreadsheet and their responses to those questions. Thus, the surveys clearly fall within the definition of a “student record” under N.J.A.C. 6A:32-2.1 as “information related to an individual

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educational agencies must comply with those provisions when they respond to such requests.” L.R. v. Camden City Pub. Sch. Dist., 238 N.J. 547, 569 (2019).

student” and are exempt for the reasons set forth by the L.R. court. Further, Mr. Turner accurately noted in his certification that there is no evidence in the record that the Complainant qualified as an individual eligible to access these surveys under N.J.A.C. 6A:32-7.5.

Accordingly, the Custodian lawfully denied access to the responsive student surveys. N.J.S.A. 47:1A-6. Specifically, said surveys are “student records” as defined in N.J.A.C. 6A:32-2.1 and are thus exempt from disclosure under OPRA. N.J.S.A. 47:1A-9(a); L.R., 452 N.J. Super. 56. Additionally, the Complainant failed to prove that he fell within one of categories of individuals allowed to access “student records.” N.J.A.C. 6A:32-7.5.

### **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 violated OPRA by failing to respond to the Complainant’s January 16, 2018 OPRA request item Nos. 2 and 3. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). Further, the Custodian’s responses to the Complainant’s December 18, 2017 and January 16, 2018 OPRA requests were insufficient. Notwithstanding, the Custodian lawfully denied access to the redacted portions of the October 16 and November 1, 2017 e-mails, spreadsheet, and student surveys. N.J.S.A. 47:1A-9(a); N.J.A.C. 6A:32-7.5. Further, the Custodian ultimately disclosed those remaining records that existed to the Complainant on February 26 and May 3, 2018 respectively. Additionally, the evidence of record does not indicate that the Custodian’s violations of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

## Prevailing Party Attorney's Fees

OPRA provides that:

A person who is denied access to a government record by the custodian of the record, at the option of the requestor, may: institute a proceeding to challenge the custodian's decision by filing an action in Superior Court . . .; or in lieu of filing an action in Superior Court, file a complaint with the Government Records Council . . . . A requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee.

[N.J.S.A. 47:1A-6.]

In Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the Court held that a complainant is a “prevailing party” if he achieves the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian’s conduct. Id. at 432. Additionally, the Court held that attorney’s fees may be awarded when the requestor is successful (or partially successful) via a judicial decree, a quasi-judicial determination, or a settlement of the parties that indicates access was improperly denied and the requested records are disclosed. Id.

Additionally, the New Jersey Supreme Court has ruled on the issue of “prevailing party” attorney’s fees. In Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), the Supreme Court discussed the catalyst theory, “which posits that a plaintiff is a ‘prevailing party’ if it achieves the desired result because the lawsuit brought about a voluntary change in the defendant’s conduct.” Mason, 196 N.J. at 71, (quoting Buckhannon Bd. & Care Home v. West Virginia Dep’t of Health & Human Res., 532 U.S. 598, 131 S. Ct. 1835, 149 L. Ed. 2d 855 (2001)). In Buckhannon, the Supreme Court stated that the phrase “prevailing party” is a legal term of art that refers to a “party in whose favor a judgment is rendered.” (quoting Black’s Law Dictionary 1145 (7<sup>th</sup> ed. 1999)). The Supreme Court rejected the catalyst theory as a basis for prevailing party attorney fees, in part because “[i]t allows an award where there is no judicially sanctioned change in the legal relationship of the parties . . .” Id. at 605, 121 S. Ct. at 1840, 149 L. Ed. 2d at 863. Further, the Supreme Court expressed concern that the catalyst theory would spawn extra litigation over attorney's fees. Id. at 609, 121 S. Ct. at 1843, 149 L. Ed. 2d at 866.

However, the Court noted in Mason, that Buckhannon is binding only when counsel fee provisions under federal statutes are at issue. 196 N.J. at 72, citing Teeters, 387 N.J. Super. at 429; see, e.g., Baer v. Klagholz, 346 N.J. Super. 79 (App. Div. 2001) (applying Buckhannon to the federal Individuals with Disabilities Education Act), certif. denied, 174 N.J. 193 (2002). “But in interpreting New Jersey law, we look to state law precedent and the specific state statute before us. When appropriate, we depart from the reasoning of federal cases that interpret comparable federal statutes.” 196 N.J. at 73 (citations omitted).

The Mason Court accepted the application of the catalyst theory within the context of OPRA, stating that:

OPRA itself contains broader language on attorney's fees than the former RTKL



did. OPRA provides that “[a] requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee.” N.J.S.A. 47:1A-6. Under the prior RTKL, “[a] plaintiff in whose favor such an order [requiring access to public records] issues . . . may be awarded a reasonable attorney's fee not to exceed \$500.00.” N.J.S.A. 47:1A-4 (repealed 2002). The Legislature's revisions therefore: (1) mandate, rather than permit, an award of attorney's fees to a prevailing party; and (2) eliminate the \$500 cap on fees and permit a reasonable, and quite likely higher, fee award. Those changes expand counsel fee awards under OPRA.

[Mason at 73-76.]

The Court in Mason, further held that:

[R]equestors are entitled to attorney’s fees under OPRA, absent a judgment or an enforceable consent decree, when they can demonstrate (1) “a factual causal nexus between plaintiff’s litigation and the relief ultimately achieved”; and (2) “that the relief ultimately secured by plaintiffs had a basis in law.” Singer v. State, 95 N.J. 487, 495, *cert denied* (1984).

[Id. at 76.]

In Mason, the plaintiff submitted an OPRA request on February 9, 2004. The defendant responded on February 20, eight (8) business days later, or one day beyond the statutory limit. Id. at 79. As a result, the Court shifted the burden to the defendant to prove that the plaintiff’s lawsuit, filed on March 4, was not the catalyst behind defendant’s voluntary disclosure. Id. Because defendant’s February 20 response included a copy of a memo dated February 19 -- the seventh business day -- which advised that one of the requested records should be available on February 27 and the other one week later, the Court determined that the plaintiff’s lawsuit was not the catalyst for the release of the records and found that she was not entitled to an award of prevailing party attorney fees. Id. at 80.

In determining whether the Complainant is a prevailing party, the GRC acknowledges that the Custodian’s failure to respond in writing to the Complainant’s January 16, 2018 OPRA request item Nos. 2 and 3 in a timely manner resulted in a “deemed” denial pursuant to N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i). Thus, the burden of proving that this complaint was not the catalyst for providing the responsive records to the Complainant shifts to the Custodian pursuant to Mason, *supra*.

In the matter before the Council, the Complainant filed the instant complaint stating that he was representing Coach Racioppe. Therein, the Complainant argued that the Custodian denied him access to unredacted copies of the October 16, and November 1, 2017 e-mails, as well as multiple other e-mails from 2016 and 2017 responsive to his January 16, 2018 OPRA request item Nos. 2 and 3, e-mail attachments, and student surveys. In the SOI, the Custodian certified that she denied access to certain records under FERPA and OPRA. However, a month after the complaint filing and over two (2) months after the Complainant’s e-mail alerting her that 2016 and 2017 e-mails remained undisclosed, the Custodian disclosed thirty-one (31) additional pages of e-mails.

The Complainant responded to the SOI noting that he finally received the e-mails sought, but only after the filing of this complaint. The Complainant further contended that the GRC should require disclosure of the responsive surveys and that he should be awarded attorney's fees as a prevailing party.

The evidence of record here supports that the Complainant has prevailed in regard to his January 16, 2018 OPRA request item Nos. 2 and 3. Specifically, prior to the filing of this complaint, the Complainant had to engage the Custodian on a few occasions to garner a full response to each OPRA request. However, over a month passed between the Complainant's notification that the Custodian failed to respond to said OPRA request items and the instant complaint. It was only after this filing and another month that the Custodian finally disclosed responsive e-mails as part of the SOI. Thus, even though the Custodian lawfully denied access to the redacted portions of the October 16, and November 1, 2017 e-mails, as well as the spreadsheet and surveys, this complaint nonetheless resulted in a change in the Custodian's conduct as it related to the nondisclosed e-mails. Further, there is no evidence in the record proving that this complaint was not the catalyst for the SOI disclosure. For these reasons, the Complainant prevailed and is entitled to a reasonable award in attorney's fees commensurate with the relief achieved. See e.g. Mills v. State, 2020 N.J. Super. Unpub. LEXIS 1545 (App. Div. 2020).

Therefore, the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." Teeters, 387 N.J. Super. 432. Additionally, a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Mason, 196 N.J. 51. Specifically, the filing of this complaint led directly to the Custodian disclosing outstanding e-mails responsive to the Complainant's January 16, 2018 OPRA request item Nos. 2 and 3. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. 432, and Mason, 196 N.J. 51. **Based on this determination, the parties shall confer in an effort to decide the amount of reasonable attorney's fees to be paid to Complainant within twenty (20) business days. The parties shall promptly notify the GRC in writing if a fee agreement is reached. If the parties cannot agree on the amount of attorney's fees, Complainant's Counsel shall submit a fee application to the Council in accordance with N.J.A.C. 5:105-2.13.**

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. Mr. Turner complied with the Council's April 28, 2020 Interim Order because he responded in the extended time frame submitting a complete *in camera* package to the GRC. Further, Mr. Turner submitted a certification detailing his reasons for denying access to the requested student surveys. Finally, Mr. Turner, simultaneously provided certified confirmation of compliance to the Executive Director.
2. **The *In Camera* Examination set forth above reveals the Custodian has lawfully denied access to redacted portions of the October 16 and November 1, 2017 e-mails and the responsive spreadsheet pursuant to N.J.S.A. 47:1A-6.**

3. The Custodian lawfully denied access to the responsive student surveys. N.J.S.A. 47:1A-6. Specifically, said surveys are “student records” as defined in N.J.A.C. 6A:32-2.1 and are thus exempt from disclosure under OPRA. N.J.S.A. 47:1A-9(a); L.R. v. Camden City Pub. Sch. Dist., 452 N.J. Super. 56 (App. Div. 2017). Additionally, the Complainant failed to prove that he fell within one of categories of individuals allowed to access “student records.” N.J.A.C. 6A:32-7.5.
4. The Custodian violated OPRA by failing to respond to the Complainant’s January 16, 2018 OPRA request item Nos. 2 and 3. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). Further, the Custodian’s responses to the Complainant’s December 18, 2017 and January 16, 2018 OPRA requests were insufficient. Notwithstanding, the Custodian lawfully denied access to the redacted portions of the October 16 and November 1, 2017 e-mails, spreadsheet, and student surveys. N.J.S.A. 47:1A-9(a); N.J.A.C. 6A:32-7.5. Further, the Custodian ultimately disclosed those remaining records that existed to the Complainant on February 26 and May 3, 2018 respectively. Additionally, the evidence of record does not indicate that the Custodian’s violations of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.
5. The Complainant has achieved “the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian’s conduct.” Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006). Additionally, a factual causal nexus exists between the Complainant’s filing of a Denial of Access Complaint and the relief ultimately achieved. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Specifically, the filing of this complaint led directly to the Custodian disclosing outstanding e-mails responsive to the Complainant’s January 16, 2018 OPRA request item Nos. 2 and 3. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney’s fee. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. 432, and Mason, 196 N.J. 51. **Based on this determination, the parties shall confer in an effort to decide the amount of reasonable attorney’s fees to be paid to Complainant within twenty (20) business days. The parties shall promptly notify the GRC in writing if a fee agreement is reached. If the parties cannot agree on the amount of attorney's fees, Complainant’s Counsel shall submit a fee application to the Council in accordance with N.J.A.C. 5:105-2.13.**

Prepared By: Frank F. Caruso  
Executive Director

October 27, 2020



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PHILIP D. MURPHY  
Governor

LT. GOVERNOR SHEILA Y. OLIVER  
Commissioner

**INTERIM ORDER**

**April 28, 2020 Government Records Council Meeting**

Gregory Mascera, Esq.  
Complainant

Complaint No. 2018-61

v.

Verona Board of Education (Essex)  
Custodian of Record

At the April 28, 2020 public meeting, the Government Records Council (“Council”) considered the April 21, 2020 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’s failure to respond to the Complainant’s clarified January 16, 2018 OPRA request item Nos. 2 and 3 within the renewed seven (7) business days resulted in a “deemed” denial of access. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i); Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2011-100 (Interim Order dated June 26, 2012). However, the GRC declines to order any additional actions because the Custodian ultimately disclosed those responsive e-mails on February 26 and March 3, 2018 respectively.
2. Because the Custodian failed to provide a specific lawful basis for redactions made to two (2) e-mails, as well as the denial of the spreadsheet attachment, her responses to the Complainant’s December 18, 2017 OPRA request were insufficient. N.J.S.A. 47:1A-5(g); Paff v. Borough of Lavallette, GRC Complaint No. 2007-209 (Interim Order dated June 25, 2008). Additionally, the Custodian’s response to the Complainant’s January 16, 2018 OPRA request was legally insufficient because she failed to respond to each item contained therein. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i); Paff v. Willingboro Bd. of Educ. (Burlington), GRC Complaint No. 2007-272 (May 2008). See also Lenchitz v. Pittsgrove Twp. (Salem), GRC Complaint No. 2012-265 (Interim Order dated August 27, 2013).
3. The GRC must conduct an *in camera* review of the October 16 and November 1, 2017 e-mails, as well as the spreadsheet attachment responsive to the Complainant’s December 18, 2017 OPRA request to determine the validity of the Custodian’s assertion that the record was exempt under OPRA. N.J.S.A. 47:1A-1.1. Paff v. N.J. Dep’t of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005).

4. **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. 3 above), nine (9) copies of the redacted records (in the case of the e-mails), 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.**
5. The Custodian may have unlawfully denied access to the student surveys sought in the Complainant's January 16, 2018 OPRA request item No. 1. N.J.S.A. 47:1A-6 Thus, the Custodian must locate said surveys and either disclose them or provide a specific lawful basis for denying access along with a detailed explanation of the contents. However, should the Custodian determine that no responsive records exist, she must certify to this fact.
6. **The Custodian shall comply with conclusion No. 5 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 deliver<sup>4</sup> certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,<sup>5</sup> to the Executive Director.<sup>6</sup>**
7. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
8. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

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<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."

<sup>4</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>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."

<sup>6</sup> Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

Interim Order Rendered by the  
Government Records Council  
On The 28<sup>th</sup> Day of April 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: April 29, 2020**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
April 28, 2020 Council Meeting**

**Gregory Mascera, Esq.<sup>1</sup>  
Complainant**

**GRC Complaint No. 2018-61**

v.

**Verona Board of Education (Essex)<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:**

December 18, 2017 OPRA request: Copies of:

1. All e-mails from Dr. Rui Dionisio to any member of the Verona Board of Education (“BOE”) or staff and any member of the Verona High School (“VHS”) administration or staff “in any way relating to” the decision to place football coach Louis Racioppe on administrative leave.
2. All e-mails from Dr. Dionisio to any individual not covered under No. 1 above “in any way relating to” the decision to place Coach Racioppe on administrative leave.
3. All e-mail correspondence to Dr. Dionisio to any member of the BOE or staff and any member of the VHS administration or staff “in any way relating to” the decision to place football Coach Racioppe on administrative leave.
4. All e-mails to Dr. Dionisio to any individual not covered under No. 3 above “in any way relating to” the decision to place Coach Racioppe on administrative leave.
5. All e-mails from Josh Cogdill to any member of the BOE or staff and any member of the VHS administration or staff “in any way relating to” the decision to place football Coach Racioppe on administrative leave.
6. All e-mails from Mr. Cogdill to any individual not covered under No. 5 above “in any way relating to” the decision to place Coach Racioppe on administrative leave.
7. All e-mails to Josh Cogdill to any member of the BOE or staff and any member of the VHS administration or staff “in any way relating to” the decision to place football Coach Racioppe on administrative leave.
8. All e-mails to Mr. Cogdill to any individual not covered under No. 7 above “in any way relating to” the decision to place Coach Racioppe on administrative leave.

January 16, 2018 OPRA request: Copies of:

1. All student survey responses provided to the BOE on or about October 10, 2017 regarding

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<sup>1</sup> The Complainant, an attorney with Bannon, Rawding, McDonald & Mascera (Verona, NJ) represents Louis Racioppe.

<sup>2</sup> Represented by Michael Gross, Esq. of Kenney, Gross, Kovats, & Parton (Red Bank, NJ)

- the VHS football team or coaching staff.
2. All correspondence, written or electronic, to or from any BOE member regarding the VHS football team or coaching staff from January 1, 2014 through present not to include e-mails previously disclosed in response to a prior OPRA request.
  3. All correspondence, written or otherwise, from Dr. Dionisio to or from any person regarding the VHS football team or coaching staff from January 1, 2014 through present not to include e-mails previously disclosed in response to a prior OPRA request.

**Custodian of Record:** Cheryl Nardino

**Request Received by Custodian:** December 18, 2017; January 16, 2018

**Response Made by Custodian:** December 18, 2017; January 16, 2018

**GRC Complaint Received:** April 9, 2018

### Background<sup>3</sup>

#### Request and Response:

On December 18, 2017, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On the same day, the Custodian responded in writing disclosing 224 pages of records via e-mail. On December 19, 2017, the Complainant e-mailed the Custodian advising that he did not receive attachments referenced in the disclosed records. The Complainant noted that he would send the Custodian letter seeking a “more complete response[.]”

On January 5, 2018, the Complainant sent a letter to the Custodian seeking access to three (3) attachments he asserted were omitted from the Custodian’s December 18, 2017 response. The Complainant noted that the omitted records comprised of three (3) letters and a spreadsheet. The Complainant also objected to redactions contained in two (2) e-mails dated October 16, and November 1, 2017 that were previously disclosed. On January 9, 2018, the Custodian responded via e-mail disclosing the three (3) letters. The Custodian also noted that she was attempting to locate the spreadsheet, as well as reviewing the redacted e-mails with the BOE attorney. The Custodian noted that she would be in position to respond by the next day.

On January 16, 2018, the Complainant submitted an OPRA request to the Custodian seeking the above-mentioned records. On the same day, the Complainant e-mailed the Custodian confirming a verbal conversation wherein the Custodian advised that the January 16, 2018 OPRA request item Nos. 2 and 3 resulted in over 50,000 potentially responsive e-mails. The Complainant confirmed that he agreed to amend his request to change “VHS football” to “Racioppe.” On February 21, 2018, the Complainant e-mailed the Custodian asking whether she would respond to his January 16, 2018 OPRA request item No. 1.

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<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 Executive Director the submissions necessary and relevant for the adjudication of this complaint.



On February 23, 2018, the Custodian allegedly<sup>4</sup> denied access to the spreadsheet and unredacted copies of the e-mails responsive to the Complainant's December 18, 2017 OPRA request.

On February 26, 2018, the Custodian responded in writing to the Complainant's January 16, 2018 OPRA request disclosing 104 pages of records. On February 28, 2018, the Complainant sent a letter to the Custodian confirming receipt of the responsive records but noting that no 2016 or 2017 e-mails were included. The Complainant thus requested that the Custodian disclose the missing e-mails at her earliest convenience.

#### Denial of Access Complaint:

On April 9, 2019, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant asserted that he submitted multiple OPRA and status update requests to the Custodian between December 18, 2017 and March 26, 2018. The Complainant contended that the Custodian's responses were incomplete because they did not include attachments or e-mails for certain years. The Complainant further noted that he received a few e-mails with redactions he believed to be unlawful.

The Complainant contended that he was challenging the redacted e-mails disclosed in response to his December 18, 2017 OPRA request. The Complainant asserted that he was also challenging the Custodian's failure to disclose 2016 and 2017 e-mails, as well as the student survey responses responsive to his January 16, 2018 OPRA request.

#### Statement of Information:

On May 3, 2018, the Custodian filed a Statement of Information ("SOI"). The Custodian certified that she received the Complainant's OPRA requests on December 18, 2017 and January 16, 2018 respectively. The Custodian certified that her search for responsive records included conducting e-mail searches on the BOE's e-mail server. The Custodian certified that she responded in writing on multiple occasions disclosing records, some with redactions, and denying access to one (1) e-mail and a spreadsheet due to student confidentiality under the Family Educational Rights and Privacy Act ("FERPA") and "OPRA laws." The Custodian further certified that she was providing as part of the SOI thirty-one (31) additional pages of e-mails responsive to the Complainant's January 16, 2018 OPRA request item Nos. 2 and 3.

#### Additional Submissions:

On May 22, 2018, the Complainant sent a letter to the GRC. Therein, the Complainant alleged that the BOE failed to respond to his OPRA requests fully. The Complainant noted that the Custodian did disclose outstanding e-mails responsive to the January 16, 2018 OPRA request only after he filed the instant complaint.

The Complainant further contended that the Custodian had yet to disclose to him the student survey responses he sought in his January 16, 2018 OPRA request item No. 1. The

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<sup>4</sup> Neither the Custodian nor Complainant provided a copy of the response as part of their filings.

Complainant asserted that he would “rely on [the GRC’s] authority to ensure” that the Custodian discloses the responsive surveys to him. The Complainant further requested that the GRC determine that he is a prevailing party subject to an award of attorney’s fees.

### 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).<sup>5</sup> 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).

Further, should a requestor amend or clarify an OPRA request, it is reasonable that the time frame for a custodian to respond should begin anew; thus, providing a custodian with the statutorily mandated time frame to respond to the new or altered OPRA request. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). See Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2011-100 (Interim Order dated June 26, 2012) (holding that the custodian’s failure to respond within the new time frame following receipt of clarification resulted in a “deemed” denial of access); Gartner v. Borough of Middlesex (Middlesex), GRC Complaint No. 2014-203 (Interim Order dated February 24, 2015).

Regarding the Complainant’s January 16, 2018 OPRA request item Nos. 2 and 3, the Custodian sought clarification verbally on January 16, 2018. The Complainant provided clarification in writing via e-mail on that day. However, the Custodian ultimately did not provide an initial response until February 26, 2018, or approximately twenty-seven (27) business days after receipt of the clarification. Consistent with Carter, GRC 2011-100, the Custodian’s failure to respond in writing within seven (7) business days after receiving clarification resulted in a “deemed denial.”

Accordingly, the Custodian’s failure to respond to the Complainant’s clarified January 16, 2018 OPRA request item Nos. 2 and 3 within the renewed seven (7) business days resulted in a “deemed” denial of access. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i); Carter, 2011-100. However, the GRC declines to order any additional actions because the Custodian ultimately disclosed those responsive e-mails on February 26 and March 3, 2018 respectively.

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

## **Sufficiency of Response**

OPRA provides that “[i]f the custodian is unable to comply with a request for access, the custodian shall indicate the specific basis therefor on the request form and promptly return it to the requestor.” N.J.S.A. 47:1A-5(g). OPRA also requires that, when providing access to redacted records, a custodian shall provide a specific lawful basis for redactions. Paff v. Borough of Lavallette, GRC Complaint No. 2007-209 (Interim Order dated June 25, 2008), Schwarz v. N.J. Dep’t of Human Serv., GRC Complaint No. 2004-60 (February 2005); Renna v. Union Cnty. Improvement Auth., GRC Complaint No. 2008-86 (May 2010).

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 Paff v. Willingboro Bd. of Educ. (Burlington), GRC Complaint No. 2007-272 (May 2008), the Council held that “. . . [t]he Custodian’s response was legally insufficient because he failed to respond to each request item individually. Therefore, the Custodian has violated N.J.S.A. 47:1A-5(g).” See also Lenchitz v. Pittsgrove Twp. (Salem), GRC Complaint No. 2012-265 (Interim Order dated August 27, 2013).

Here, the Custodian disclosed two (2) e-mails with redactions in response to the Complainant’s December 18, 2017 OPRA request. The Custodian also withheld a spreadsheet attachment. However, the Custodian did not provide any specific lawful basis for these denials until submission of the SOL. Thus, the evidence of record supports that prior responses to this OPRA request were insufficient in accordance with Paff, GRC 2007-209.

Further, the GRC has already determined that the Custodian’s failure to timely respond to the Complainant’s clarification of his January 16, 2018 OPRA request item Nos. 2 and 3 resulted in a “deemed” denial. However, it is also evident that the Custodian failed to address the Complainant’s January 16, 2018 item No. 1 at any point prior to, or during, the pendency of this complaint. Thus, per Paff, GRC 2007-272, the Custodian’s failure to address said request item resulted in an insufficient response.

As such, because the Custodian failed to provide a specific lawful basis for redactions made to two (2) e-mails, as well as the denial of the spreadsheet attachment, her responses to the Complainant’s December 18, 2017 OPRA request were insufficient. N.J.S.A. 47:1A-5(g); Paff, GRC 2007-209. Additionally, the Custodian’s response to the Complainant’s January 16, 2018 OPRA request was legally insufficient because she failed to respond to each item contained therein. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i); Paff, GRC 2007-272. See also Lenchitz, 2012-265.

## **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.

### Redacted E-mails and Withheld Spreadsheet

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 matter before the Council, the Complainant's December 18, 2017 OPRA request sought specific correspondence regarding the Complainant's client. The Custodian disclosed multiple e-mails and attachments over the next month. Of those disclosed records, the Custodian provided two (2) e-mails dated October 16 and November 1, 2017 with redactions. Further, the Custodian extended the time frame to locate and review the spreadsheet attachment responsive to said OPRA request. In the Denial of Access Complaint, the Complainant disputed the redactions to the two (2) e-mails as well as the Custodian's failure to disclose the spreadsheet. In the SOI, the Custodian argued that she redacted the e-mails and was withholding the spreadsheet under FERPA and OPRA.

Upon review of the evidence of record in the instant complaint, the GRC cannot determine whether the Custodian properly redacted the two (2) e-mails at issue. This is because neither the

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

Complainant nor the Custodian provided copies of those e-mails to the GRC. Thus, the GRC cannot independently determine whether the redactions could have included information reasonably exempt under FERPA or OPRA. Further, the GRC cannot make a determination as to the content of the withheld spreadsheet because the Custodian did not provide any description of it. For these reasons, a “meaningful review” is necessary to determine whether the redacted portions of the e-mails and the entirety of the spreadsheet attachment fall within the asserted exemption. Paff, 379 N.J. Super. at 355.

Therefore, the GRC must conduct an *in camera* review of the October 16 and November 1, 2017 e-mails, as well as the spreadsheet attachment responsive to the Complainant’s December 18, 2017 OPRA request to determine the validity of the Custodian’s assertion that the record was exempt under OPRA. N.J.S.A. 47:1A-1.1. See Paff, 379 N.J. Super. at 346.

### Student Surveys

Regarding the Complainant’s January 16, 2018 OPRA request item No. 1, the record before the GRC is devoid of any factual or legal arguments relating to the requested student surveys. The Complainant merely argued that he never received the surveys and requested that the GRC require disclosure. On the other hand, the Custodian never addressed the surveys in any way either prior to the Complainant filing the instant complaint or during its pendency. Thus, the GRC cannot determine whether: 1) the requested surveys exist; or 2) the Custodian disclosed or denied the requested surveys under a specific lawful basis.

Accordingly, the Custodian may have unlawfully denied access to the student surveys sought in the Complainant’s January 16, 2018 OPRA request item No. 1. N.J.S.A. 47:1A-6. Thus, the Custodian must locate said surveys and either disclose them or provide a specific lawful basis for denying access along with a detailed explanation of the contents. However, should the Custodian determine that no responsive records exist, she must certify to this fact.

### 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.

### Prevailing Party Attorney’s Fees

The Council defers analysis of whether the Complainant is a prevailing party 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’s failure to respond to the Complainant’s clarified January 16, 2018 OPRA request item Nos. 2 and 3 within the renewed seven (7) business days resulted

- in a “deemed” denial of access. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i); Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2011-100 (Interim Order dated June 26, 2012). However, the GRC declines to order any additional actions because the Custodian ultimately disclosed those responsive e-mails on February 26 and March 3, 2018 respectively.
2. Because the Custodian failed to provide a specific lawful basis for redactions made to two (2) e-mails, as well as the denial of the spreadsheet attachment, her responses to the Complainant’s December 18, 2017 OPRA request were insufficient. N.J.S.A. 47:1A-5(g); Paff v. Borough of Lavallette, GRC Complaint No. 2007-209 (Interim Order dated June 25, 2008). Additionally, the Custodian’s response to the Complainant’s January 16, 2018 OPRA request was legally insufficient because she failed to respond to each item contained therein. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i); Paff v. Willingboro Bd. of Educ. (Burlington), GRC Complaint No. 2007-272 (May 2008). See also Lenchitz v. Pittsgrove Twp. (Salem), GRC Complaint No. 2012-265 (Interim Order dated August 27, 2013).
  3. The GRC must conduct an *in camera* review of the October 16 and November 1, 2017 e-mails, as well as the spreadsheet attachment responsive to the Complainant’s December 18, 2017 OPRA request to determine the validity of the Custodian’s assertion that the record was exempt under OPRA. N.J.S.A. 47:1A-1.1. Paff v. N.J. Dep’t of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005).
  4. **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. 3 above), nine (9) copies of the redacted records (in the case of the e-mails), 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.**
  5. The Custodian may have unlawfully denied access to the student surveys sought in the Complainant’s January 16, 2018 OPRA request item No. 1. N.J.S.A. 47:1A-6 Thus, the Custodian must locate said surveys and either disclose them or provide a specific lawful basis for denying access along with a detailed explanation of the contents. However, should the Custodian determine that no responsive records exist, she must certify to this fact.
  6. **The Custodian shall comply with conclusion No. 5 above within five (5) business days from receipt of the Council’s Interim Order with appropriate redactions,**

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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."

**including a detailed document index explaining the lawful basis for each redaction, if applicable. Further, the Custodian shall simultaneously deliver<sup>10</sup> certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,<sup>11</sup> to the Executive Director.<sup>12</sup>**

7. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
8. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Prepared By: Frank F. Caruso  
Executive Director

April 21, 2020

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<sup>10</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>11</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>12</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.