



## State of New Jersey

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*Lieutenant Governor*

JACQUELYN A. SUÁREZ  
*Acting Commissioner*

### FINAL DECISION

#### October 3, 2023 Government Records Council Meeting

Nicole Contaldi  
Complainant

Complaint No. 2021-232

v.

Flemington-Raritan Regional School District (Hunterdon)  
Custodian of Record

At the October 3, 2023 public meeting, the Government Records Council (“Council”) considered the September 26, 2023 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian did not bear his burden of proof that he timely responded to either of the Complainant’s OPRA requests. N.J.S.A. 47:1A-6. As such, the Custodian’s failure to respond in writing to either 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 requests 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’s failure to conduct a reasonable search for records responsive to both of the Complainant’s OPRA requests resulted in an insufficient search. Schneble v. N.J. Dep’t of Env’tl. Protection, GRC Complaint No. 2007-220 (April 2008). However, the GRC declines to order any further action because on August 30, 2023, the current Custodian located and disclosed (through her response to the GRC’s request for additional information) the e-mail sought in the September 20, 2021 OPRA request, and further certified that no records beyond those disclosed in response to the September 21, 2021 OPRA request on October 17, 2021 existed.

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 3<sup>rd</sup> Day of October 2023

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: October 10, 2023**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
October 3, 2023 Council Meeting**

**Nicole Contaldi<sup>1</sup>  
Complainant**

**GRC Complaint No. 2021-232**

**v.**

**Flemington-Raritan Regional School District (Hunterdon)<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:**

September 20, 2021 OPRA request: Copies of any e-mail or memorandum between Superintendent Dr. Kari McGann and any Flemington-Raritan Regional School District (“District”) Board members regarding “mask breaks” between September 1, 2021 and September 9, 2021.

September 21, 2021 OPRA request: Copies of any e-mail communication between District staff, the Custodian, Dr. McGann, and any Board member regarding the use of the District logo between September 17, 2021 and September 21, 2021.

**Custodian of Record:** Dr. Edward Izbicki<sup>3</sup>

**Request Received by Custodian:** September 20, 2021; September 21, 2021

**Response Made by Custodian:** October 1, 2021

**GRC Complaint Received:** October 1, 2021

**Background<sup>4</sup>**

**Request and Response:**

On September 20, 2021, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On September 21, 2021, the Complainant submitted an OPRA request to the Custodian seeking the above-mentioned records.

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

<sup>2</sup> Represented by Reece R. McGovern, Esq., of Comegno Law Group, P.C. (Moorestown, NJ). Previously represented by Alexander T. McLavish, Esq. from the same firm.

<sup>3</sup> The current “custodian of record” is Business Administrator Tanya Dawson.

<sup>4</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.

Nicole Contaldi v. Flemington-Raritan Regional School District (Hunterdon), 2021-232 – Findings and Recommendations of the Executive Director

On October 1, 2021, the ninth (9<sup>th</sup>) business day after receipt of the September 20, 2021 OPRA request, Administrative Secretary Linda A. Benz responded in writing on the Custodian's behalf apologizing for the delayed response and noting that the District has received numerous OPRA requests for various records. Ms. Benz also noted that the District has been going through its annual audit over the last few weeks. Ms. Benz attached to her e-mail an undated letter from the Custodian addressed to a different requestor responding to their OPRA request and disclosing an e-mail sent to the District mailing list. On the same day, the Complainant responded expressing confusion as to why, in response to her September 20, 2021 OPRA request, she received a letter addressed to another requestor. The Complainant also expressed confusion on whether her September 21, 2021 OPRA request was being denied. Later on the same day, Ms. Benz responded in writing to the September 20, 2021 OPRA request producing a new response letter from the Custodian addressing the Complainant and again disclosing the same e-mail.

Also on October 1, 2021, the Custodian responded to the Complainant's September 21, 2021 OPRA request by forwarding an e-mail from himself to the Complainant dated September 21, 2021, wherein he advised the Complainant that there is no Board policy on District logo use. The Complainant responded asking the Custodian to confirm whether his September 21, 2021 e-mail was a response to her OPRA request submitted after he sent same.

#### Denial of Access Complaint:

On October 1, 2021, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant asserted that she received a late response to her September 20, 2021 OPRA request that was addressed to another individual. The Complainant further asserted that she did not receive a response to her September 21, 2021 OPRA request.

#### Supplemental Response:

On October 27, 2021, the Custodian responded to the Complainant's September 21, 2021 OPRA request disclosing ten (10) pages of e-mails and attachments.

#### Statement of Information:

On October 28, 2021, the Custodian filed a Statement of Information ("SOI"). The Custodian certified that he received the Complainant's OPRA requests on September 20, and 21, 2021 respectively. The Custodian certified that his search included reviewing the District's "records and e-mail system," as well as looking for "policies and regulations" related to the use of the District's logo. The Custodian certified that he responded to the Complainant's September 20, 2021 OPRA request in writing on October 1, 2021 disclosing an e-mail but that the response was mistakenly addressed to another requestor who filed "a similar OPRA request." The Custodian averred that due to this "honest mistake," the Custodian resent his response on the same day correcting the address issue. The Custodian further certified that he responded to the Complainant's September 21, 2021 OPRA request on the same day asserting that no responsive records existed.

The Custodian argued that he provided all records responsive to the Complainant's September 20, 2021 OPRA request regardless of his addressing mistake. The Custodian further argued that he timely responded to the Complainant's September 21, 2021 OPRA request stating that no records existed. The Custodian then certified that an additional search yielded ten (10) pages of records, which were disclosed to the Complainant on October 27, 2021. The Custodian thus argued that no unlawful denial of access occurred, and this complaint should be dismissed.

Additional Submissions:

On October 28, 2021, the Complainant e-mailed the GRC noting her disagreement with the SOI as "inadequately and inaccurately addressing" her complaint. Regarding the September 20, 2021 OPRA request, the Complainant contended that the OPRA request was not the same as the different requestor's request because it sought correspondence between Dr. McGann and "the *Board members*." (Emphasis in original). The Complainant stated that she was instead provided an e-mail between Dr. McGann and faculty. The Complainant asserted that Dr. McGann herself indicated that she sent separate correspondence to the Board and that is what her OPRA request sought.

Regarding the September 21, 2021 OPRA request, the Complainant argued that the only records she received were e-mails between her and the Custodian. The Complainant noted that following this exchange of e-mails, Board members removed the District's logo from their social media campaign sites. The Complainant asserted that she specifically sought the correspondence that resulted in these removals. The Complainant argued that to have her own e-mails sent back to her in response "is unacceptable."

On August 24, 2023, the GRC sought additional information from the Custodian. N.J.A.C. 5:105-2.4(m). The GRC stated that the Complainant disagreed with the Custodian's SOI position that all responsive records were disclosed. The GRC asked that, based on those disagreements, the Custodian submit a certification answering the following questions:

1. Regarding the September 20, 2021 OPRA request, are Board members' e-mail addresses included in the "District – Entire District" e-mail list to which the September 7, 2021 e-mail was sent?
  - a. If yes, was a separate e-mail sent collectively or individually to Board members following the disclosed e-mail?
  - b. If no, please identify whether Board members were sent the exact or a similar e-mail and the date and time of said correspondence.
2. Regarding the September 21, 2021 OPRA request, did the District correspond via e-mail, text message, social media messenger or unwritten means with Board members utilizing the District's logo on their campaign pages during the time frame identified within the OPRA request?

The GRC requested that the certification(s) be submitted by August 30, 2023.

On August 30, 2023, the current Custodian responded to the GRC's request for additional information. Regarding the September 20, 2021 OPRA request, the current Custodian certified

that Board members were sent a separate e-mail on September 7, 2021, which was attached therein. Regarding the September 21, 2021 OPRA request, the current Custodian certified that the District did not correspond in any way with Board members utilizing the District's logo on their campaign social media sites during the identified time frame.

## 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).

In the Denial of Access Complaint, the Complainant asserted that the Custodian failed to timely respond to her September 20, 2021 OPRA request and did not respond to the September 21, 2021 OPRA request. In the SOI, the Custodian certified that he received the September 20, 2021 OPRA request on that day and responded to it on October 1, 2021. The Custodian also affirmed that he received the September 21, 2021 OPRA request on the same day as receipt and responded thereon advising that no District logo policies existed. The Custodian further certified that he again responded on October 1, 2021 sending the Complainant his September 21, 2021 response.

Upon review, the District's response to the September 20, 2021 OPRA request through Ms. Benz occurred on the ninth (9<sup>th</sup>) business day after receipt of the subject OPRA request. As for the September 21, 2021 OPRA request, the evidence of record does not support the Custodian's position that he timely responded to same. Specifically, the Custodian's September 21, 2021 e-mail advising the Complainant that no District logo policy existed occurred nearly thirty (30) minutes before the Complainant submitted her OPRA request. This presumably is the e-mail the Custodian certified was his response to the OPRA request and clearly led to the Complainant's October 1, 2021 statement that she had not received a response. The Custodian responded to that statement later on the same day, which was the eighth (8<sup>th</sup>) business day after receipt, resending the September 21, 2021 e-mail. However, the Custodian cannot say that the September 21, 2021 e-mail was his official response because it preceded the actual OPRA request. Thus, the evidence supports that a "deemed" denial of access to both OPRA requests occurred.

Therefore, the Custodian did not bear his burden of proof that he timely responded to either of the Complainant's OPRA requests. N.J.S.A. 47:1A-6. As such, the Custodian's failure to

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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.

respond in writing to either 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 requests pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley, GRC 2007-11.

### **Insufficient Search**

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.

Further, it is the custodian’s responsibility to perform a complete search for the requested records before responding to an OPRA request, as doing so will help ensure that the custodian’s response is accurate and has an appropriate basis in law. In Schneble v. N.J. Dep’t of Env’tl. Protection, GRC Complaint No. 2007-220 (April 2008), the custodian initially stated that no records responsive to the complainant’s OPRA request existed. The custodian certified that after receipt of the complainant’s denial of access complaint, which contained e-mails responsive to the complainant’s request, the custodian conducted a second search and found additional records responsive to the complainant’s request. The GRC held that the custodian had performed an inadequate search and thus unlawfully denied access to the responsive records. See also Lebbing v. Borough of Highland Park (Middlesex), GRC Complaint No. 2009-251 (January 2011).

Here, the Complainant’s September 20, 2021 OPRA request sought e-mails between Dr. McGann and the Board members related to mask policies for a certain time period. The District responded disclosing an e-mail sent to the District e-mail list previously disclosed in response to another OPRA request. This complaint followed, wherein the Complainant argued that the e-mail disclosed was not the e-mail sought and that Dr. McGann sent additional e-mails to the Board members. In the SOI, the Custodian certified that he provided the record that existed and that it was responsive to the subject OPRA request. However, in response to the GRC’s August 24, 2023 request for additional information, on which the Complainant was copied, the current Custodian certified that a separate e-mail was sent to the Board members and attached same.

Further, the Complainant’s September 21, 2021 OPRA request sought e-mails between identified individuals from September 17, through 21, 2021 related to the District’s logo. The Complainant filed this Denial of Access Complaint arguing that she did not receive a response. In the SOI, the Custodian certified that he conducted a search “of the [District’s] policies and regulations regarding” logo use and responded to said OPRA request stating that no records existed. However, the Custodian further certified that on October 27, 2021, following the filing of this complaint and after conducting an “additional search,” the Custodian disclosed ten (10) pages of e-mails and attachments.<sup>6</sup> Also, in response to the GRC’s August 24, 2023 request for additional

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<sup>6</sup> The GRC notes that all e-mails disclosed were between the Complainant and the Custodian. The GRC has previously held that custodians were not required to disclose records composed by and sent the requestor. See Caggiano v. N.J. Office of the Governor, GRC Complaint No. 2014-408 (September 2015) (citing Bart v. City of Paterson Hous. Auth. 403 N.J. Super. 609, 618 (App. Div. 2008))

information, the current Custodian certified that the District did not contact Board members regarding the logo issue during the identified time frame.

Upon review, the GRC is persuaded that the Custodian failed to perform a sufficient search in relation to both OPRA requests. Specifically, and regarding the September 20, 2021 OPRA request, the District disclosed an e-mail that was not responsive thereto. While the email came from Dr. McGann and a portion thereof involved masking policies, it was sent to an e-mail distribution list comprised of faculty and staff. However, the evidence of record based on the current Custodian's August 30, 2023 certification and disclosure proves that there was a separate e-mail sent to a Board member-specific e-mail list, which was actually responsive to the subject OPRA request. Further, the Custodian never explained how he arrived at the conclusion that the initial e-mail disclosed was responsive to the September 20, 2021 OPRA request.

Moreover, regarding the September 21, 2021 OPRA request, the Custodian admitted that his initial search for responsive records focused on District policies and regulations regarding logo use. However, the Complainant did not seek policies or regulations; the OPRA request obviously sought e-mails requiring a search therefor. However, the evidence of record supports that this search did not occur and resulted in an initial denial that no records existed. It was not until the Custodian performed a reasonable search following the filing of the complaint that he was able to locate and disclose ten (10) pages of e-mails. It should also be noted that notwithstanding the Complainant's disagreement with those records disclosed, the current Custodian certified on August 30, 2023 that no contact between the District and Board members regarding logo usage occurred. Thus, the facts here are like Schneble and an outcome consistent with the Council's decision there is warranted here.

Accordingly, the Custodian's failure to conduct a reasonable search for records responsive to both of the Complainant's OPRA requests resulted in an insufficient search. Schneble, GRC 2007-220. However, the GRC declines to order any further action because on August 30, 2023, the current Custodian located and disclosed (through her response to the GRC's request for additional information) the e-mail sought in the September 20, 2021 OPRA request, and further certified that no records beyond those disclosed in response to the September 21, 2021 OPRA request on October 17, 2021 existed.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. The Custodian did not bear his burden of proof that he timely responded to either of the Complainant's OPRA requests. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond in writing to either 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 requests 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's failure to conduct a reasonable search for records responsive to both of the Complainant's OPRA requests resulted in an insufficient search. Schneble v. N.J. Dep't of Env'tl. Protection, GRC Complaint No. 2007-220 (April 2008). However, the GRC declines to order any further action because on August 30, 2023, the current Custodian located and disclosed (through her response to the GRC's request for additional information) the e-mail sought in the September 20, 2021 OPRA request, and further certified that no records beyond those disclosed in response to the September 21, 2021 OPRA request on October 17, 2021 existed.

Prepared By: Frank F. Caruso  
Executive Director

September 26, 2023