



State of New Jersey

GOVERNMENT RECORDS COUNCIL

101 SOUTH BROAD STREET
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COMMISSIONER JOSEPH V. DORIA, JR.
COMMISSIONER LUCILLE DAVY
ROBIN BERG TABAKIN
DAVID FLEISHER
CATHERINE STARGHILL Esq., Executive Director

FINAL DECISION

April 30, 2008 Government Records Council Meeting

Martin O'Shea
Complainant

Complaint No. 2006-173

v.

Wayne Board of Education (Passaic)
Custodian of Record

At the April 30, 2008 public meeting, the Government Records Council ("Council") considered the April 23, 2008 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian has complied with the Council's March 26, 2008 Interim Order by releasing the requested record to the Complainant and providing a subsequent certification to the GRC within the five (5) business days ordered by the GRC.
2. Although the Custodian failed to respond to the Complainant in writing within the statutorily mandated seven (7) business days, the Custodian did provide the redacted records to the Complainant on November 3, 2006, complied with the Council's September 26, 2007 request for an *in camera* inspection and complied with the Council's March 26, 2008 Interim Order. Therefore, it is concluded that 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. However, the Custodian's actions appear to be negligent and heedless since he is vested with the legal responsibility of granting and denying access in accordance with the law.

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 30th Day of April, 2008

Robin Berg Tabakin , Chairman
Government Records Council

I attest the foregoing is a true and accurate record of the Government Records Council.

David Fleisher, Vice Chairman & Secretary
Government Records Council

Decision Distribution Date: May 13, 2008

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
April 30, 2008 Council Meeting**

**Martin O'Shea¹
Complainant**

GRC Complaint No. 2006-173

v.

**Wayne Board of Education²
Custodian of Records**

Records Relevant to Complaint:

1. Any and all resolutions passed since May 1, 2006 by the Wayne Township Board of Education in accordance with N.J.S.A. 10:4-13 authorizing the exclusion of the public from any Board meetings.
2. Any and all minutes recorded or notes taken at any and all of the closed or executive sessions authorized by the resolutions that are responsive to Item No. 1.

Request Made: September 6, 2006

Response Made: September 13, 2006³

Custodian: Wayne D. Demikoff⁴

GRC Complaint Filed: September 19, 2006

Background

March 26, 2008

Government Records Council's ("Council") Interim Order. At its March 26, 2008 public meeting, the Council considered the March 19, 2008 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 has complied with the Council's September 26, 2007 Interim Order by providing the Council with all records set forth in Paragraph 2 of the Order within five (5) business days of receiving the Council's Order.
2. **On the basis of the Council's determination in this matter, the Custodian shall comply with the Council's Findings of the *In Camera* Examination set forth in the above table within five (5) business days from receipt of**

¹ No representation listed on record.

² No representation listed on record.

³ Custodian responded verbally.

⁴ The original Custodian of Record is Gary Ottmann.

this Order and provide certified confirmation of compliance pursuant to N.J. Court Rules, 1969 R. 1:4-4 to the Executive Director.

March 27, 2008

Council's Interim Order distributed to the parties.

April 1, 2008

Custodian's response to the Council's Interim Order. The Custodian certifies that he received the Council's March 26, 2008 Interim Order on March 28, 2008. The Custodian further certifies that he redacted the records responsive to this complaint pursuant to the Interim Order and provided the redacted records to the Complainant on April 1, 2008.

Analysis

Whether the Custodian complied with the Council's March 26, 2008 Interim Order?

The Custodian certifies that he redacted the requested records pursuant to the Council's March 26, 2008 Interim Order and provided the redacted records to the Complainant on April 1, 2008, or three (3) business days after receipt of the Council's March 26, 2008 Interim Order. Therefore, the Custodian has complied with the Council's March 26, 2008 Interim Order by releasing the requested record to the Complainant and providing a subsequent certification to the GRC within the five (5) business days ordered by the GRC.

Whether the Custodian's actions rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances?

In this complaint, although the Custodian failed to respond to the Complainant in writing within the statutorily mandated seven (7) business days, the Custodian did provide the redacted records to the Complainant on November 3, 2006, complied with the Council's September 26, 2007 request for an *in camera* inspection and complied with the Council's March 26, 2008 Interim Order. Therefore, it is concluded that 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. However, the Custodian's actions appear to be negligent and heedless since he is vested with the legal responsibility of granting and denying access in accordance with the law.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian has complied with the Council's March 26, 2008 Interim Order by releasing the requested record to the Complainant and providing a subsequent certification to the GRC within the five (5) business days ordered by the GRC.

2. Although the Custodian failed to respond to the Complainant in writing within the statutorily mandated seven (7) business days, the Custodian did provide the redacted records to the Complainant on November 3, 2006, complied with the Council's September 26, 2007 request for an *in camera* inspection and complied with the Council's March 26, 2008 Interim Order. Therefore, it is concluded that 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. However, the Custodian's actions appear to be negligent and heedless since he is vested with the legal responsibility of granting and denying access in accordance with the law.

Prepared By:

Frank F. Caruso
Case Manager

Approved By:

Catherine Starghill, Esq.
Executive Director

April 23, 2008



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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COMMISSIONER JOSEPH V. DORIA, JR.
COMMISSIONER LUCILLE DAVY
ROBIN BERG TABAKIN
DAVID FLEISHER
CATHERINE STARGHILL Esq., Executive Director

INTERIM ORDER

March 26, 2008 Government Records Council Meeting

Martin O'Shea
Complainant

Complaint No. 2006-173

v.

Wayne Board of Education
Custodian of Record

At the March 26, 2008 public meeting, the Government Records Council ("Council") considered the March 19, 2008 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, finds that:

1. The Custodian has complied with the Council's September 26, 2007 Interim Order by providing the Council with all records set forth in Paragraph 2 of the Order within five (5) business days of receiving the Council's Order.
2. **On the basis of the Council's determination in this matter, the Custodian shall comply with the Council's Findings of the *In Camera* Examination set forth in the above table within five (5) business days from receipt of this Order and provide certified confirmation of compliance pursuant to N.J. Court Rules, 1969 R. 1:4-4 to the Executive Director.**

Interim Order Rendered by the
Government Records Council
On The 26th Day of March, 2008

Robin Berg Tabakin, Vice Chairman
Government Records Council

I attest the foregoing is a true and accurate record of the Government Records Council.



Janice Kovach
Government Records Council

Decision Distribution Date: March 27, 2008

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

***In Camera* Findings and Recommendations of the Executive Director
March 26, 2008 Council Meeting**

**Martin O'Shea¹
Complainant**

Complaint No. 2006-173

v.

**Wayne Board of Education (Passaic)²
Custodian of Records**

Records Relevant to Complaint:

1. Any and all resolutions passed since May 1, 2006 by the Wayne Township Board of Education in accordance with N.J.S.A. 10:4-13 authorizing the exclusion of the public from any Board meetings.
2. Any and all minutes recorded or notes taken at any and all of the closed or executive sessions authorized by the resolutions that are responsive to Item No. 1.

Request Made: September 6, 2006

Response Made: September 13, 2006³

Custodian: Gary Ottmann

GRC Complaint Filed: September 19, 2006

Background

September 26, 2007

Interim Order of the Government Records Council. At the September 26, 2007 public meeting, the Government Records Council ("Council") considered the September 19, 2007 Executive Director's Findings and Recommendations and all related documents submitted by the parties. The Council voted to adopt the entirety of said findings and recommendations. Therefore, the Council found that:

1. Pursuant to N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i., the Custodian failed to provide a written response granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, resulting in a deemed denial. Thus, the Custodian has not borne his burden of proving the deemed denial was authorized by law pursuant to N.J.S.A. 47:1A-6.
2. The GRC must conduct an *in camera* review to decide whether or not the Custodian has lawfully denied access to redacted portions of the records responsive to the Complainant's September 6, 2006 OPRA request.

¹ No legal representation listed on record.

² No legal representation listed on record.

³ Custodian responded verbally.

3. **The Custodian must deliver⁴ to the Council in a sealed envelope six copies of the requested unredacted document (see #2 above), a document or redaction index⁵, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4, that the document provided is the document 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.**
4. Pursuant to *O'Shea v. West Milford Board of Education*, 391 N.J. Super. 534 (App. Div. 2007), the notes of executive session meetings requested by the Complainant's September 6, 2006 OPRA request are not subject to disclosure if any exist.
5. The Council defers a decision as to whether the Custodian's delay in access to the requested records rises to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances until after the conclusion of the an *in camera* review of the requested records.

October 2, 2007

Interim Decision sent to both parties.

October 9, 2007

Certification of the Custodian with the following attachments:

- Letter from the Custodian to the GRC dated October 9, 2007
- Six (6) unredacted copies each of the executive session minutes for May 11, 2006, May 25, 2006, June 14, 2006, July 13, 2006, July 20, 2006 and August 17, 2006
- Six (6) copies each of the document index for the provided executive session minutes

Analysis

An *in camera* inspection was performed on the submitted records. The results of the *in camera* inspection are set forth in the following table:

Redaction Number	Record Name/Date	Description of Document And/or Redaction	Custodian's Explanation/ Citation for Non-disclosure	Findings of the <i>In Camera</i> Examination

⁴ The *in camera* documents may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as they arrive at the GRC office by the deadline.

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

1	May 11, 2006 Executive Session Minutes (2 pages)	[R]edacted portions pertains to attorney-client privileged discussions with the Board attorney relating to the status of all outstanding litigation and counsel on contractual matters, the possible resolution of a grievance filed pursuant to a collective negotiations agreement, and a student discipline issue.	<u>N.J.S.A.</u> 47:1A-1.1 Exempts from disclosure documents that are Attorney-client privileged. <u>N.J.S.A.</u> 47:1A-1.1 Exempts from disclosure documents that are related to public employees in connection with collective negotiations.	First Legal Matters Section ¶ 1: Do not redact, no privileged material disclosed. First Legal Matters Section ¶ 2: Redact everything following the word “draft” pursuant to <u>N.J.S.A.</u> 47:1A-1.1 “[a]ny record within the attorney client privilege.” First Negotiations Section ¶ 1: Redact everything following the word “discussed” pursuant to <u>N.J.S.A.</u> 47:1A-1.1 “[a]ny record within the attorney client privilege.” Second Legal Matters Section ¶ 1: Redact everything following the word “discussed” pursuant to <u>N.J.S.A.</u> 47:1A-1.1 “[a]ny record within the attorney client privilege.” Second Negotiations Section ¶ 4: Do not redact, no privileged material disclosed.
2	May 25, 2006 Executive Session Minutes (2 pages)	[R]edacted portions pertains to the decision on a grievance filed by a public	<u>N.J.S.A.</u> 47:1A-1.1 Exempts from disclosure documents that are related to	Personnel Section, ¶ 6: Redaction is appropriate pursuant to <u>N.J.S.A.</u> 47:1A- 1.1 “information

		employee, discussions with Board attorney(s) relating to outstanding litigation in the...matter, discussions with the Board attorney relating to negotiations with the WEA and the WCMA bargaining units, discussions about a personnel matter.	public employees in connection with grievances filed by or against individuals. <u>N.J.S.A.</u> 47:1A-1.1 Exempts from disclosure documents that are Attorney-client privileged. <u>N.J.S.A.</u> 47:1A-1.1 Exempts from disclosure documents that are related to public employees in connection with collective negotiations.	generated by or on behalf of public employers or public employees in connection with...any grievance...” Personnel Section, ¶ 7: Redact second sentence pursuant to <u>N.J.S.A.</u> 47:1A-1.1 “[a]ny record within the attorney client privilege.” Legal Matters Section ¶ 1: Redact everything following the words “update on” pursuant to <u>N.J.S.A.</u> 47:1A-1.1 “[a]ny record within the attorney client privilege.” Negotiations Section ¶ 1 and 2: Do not redact, no privileged material disclosed.
3	June 14, 2006 Executive Session Minutes (2 pages)	[R]edacted portions pertains to attorney-client privileged discussions with the Board attorney relating to legal matters concerning construction litigation, property issues, grievances and negotiations	<u>N.J.S.A.</u> 47:1A-1.1 Exempts from disclosure documents that are related to public employees in connection with grievances filed by or against individuals. <u>N.J.S.A.</u> 47:1A-1.1 Exempts from	Property Section ¶ 2: Redact everything following the word “meetings” pursuant to <u>N.J.S.A.</u> 47:1A-1.1 “[a]ny record within the attorney client privilege.” Property Section ¶ 3 and 4: Redact pursuant to <u>N.J.S.A.</u> 47:1A-1.1 “[a]ny record within the attorney client

		with the WAC.	disclosure documents that are Attorney-client privileged. <u>N.J.S.A.</u> 47:1A-1.1 Exempts from disclosure documents that are related to public employees in connection with collective negotiations.	privilege.” Fourth Legal Matters Section ¶ 1: Redact everything following the word “reviewed” pursuant to <u>N.J.S.A.</u> 47:1A-1.1 “information generated by or on behalf of public employers or public employees in connection with...any grievance...” Negotiations Section ¶ 1: Redact second sentence pursuant to <u>N.J.S.A.</u> 47:1A-1.1 “information generated by or on behalf of public employers or public employees in connection with...collective negotiations...”
4	July 13, 2006 Executive Session Minutes (2 pages)	[R]edacted portions pertains to attorney-client privileged discussions with the Board attorney relating to legal matters concerning an employee grievance, student discipline issue, and a student residency issue.	<u>N.J.S.A.</u> 47:1A-1.1 Exempts from disclosure documents that are related to public employees in connection with grievances filed by or against individuals. <u>N.J.S.A.</u> 47:1A-1.1 Exempts from disclosure documents that	Third Legal Matters Section ¶ 1: Do not redact, no privileged material disclosed. Third Legal Matters Section ¶ 2: Redact everything following the word “reviewed” pursuant to <u>N.J.S.A.</u> 47:1A-1.1 “information generated by or on behalf of public employers or public employees in connection with...

			are Attorney-client privileged.	any grievance...” Fourth Legal Matters Section ¶ 1: Redact second sentence pursuant to <u>N.J.S.A. 47:1A-1.1</u> “[a]ny record within the attorney client privilege.”
5	July 20, 2006 Executive Session Minutes (2 pages)	[R]edacted portions pertains to attorney-client privileged discussions with the Board attorney relating to legal matters concerning student discipline.	<u>N.J.S.A. 47:1A-1.1</u> Exempts from disclosure documents that are Attorney-client privileged.	First Legal Matters Section ¶ 3: Do not redact, no privileged material disclosed.
6	August 17, 2006 Executive Session Minutes (2 pages)	[R]edacted portions pertains to attorney-client privileged discussions with the Board attorney relating to employment matters, property issues and litigation.	<u>N.J.S.A. 47:1A-1.1</u> Exempts from disclosure documents that are Attorney-client privileged.	Second Personnel Section ¶ 5: Do not redact, no privileged material disclosed. Second Legal Matters Section ¶ 2 and 3: Redact everything following the word “reviewed” pursuant to <u>N.J.S.A. 47:1A-1.1</u> “[a]ny record within the attorney client privilege.” Second Legal Matters Section ¶ 4: Redact everything following the word “reviewed” pursuant to <u>N.J.S.A. 47:1A-1.1</u> “[a]ny record within the attorney

				client privilege.” And pursuant to <u>N.J.S.A. 47:1A-1.1</u> as inter-agency or intra-agency advisory, consultative or deliberative material.
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Conclusions and Recommendations

The Executive Director respectfully recommends that the Council find that:

1. The Custodian has complied with the Council’s September 26, 2007 Interim Order by providing the Council with all records set forth in Paragraph 2 of the Order within five (5) business days of receiving the Council’s Order.
2. **On the basis of the Council’s determination in this matter, the Custodian shall comply with the Council’s Findings of the *In Camera* Examination set forth in the above table within five (5) business days from receipt of this Order and provide certified confirmation of compliance pursuant to N.J. Court Rules, 1969 R. 1:4-4 to the Executive Director.**

Prepared By:

John E. Stewart
Case Manager/*In Camera* Attorney

Approved By:

Catherine Starghill
Executive Director

March 19, 2007



State of New Jersey
GOVERNMENT RECORDS COUNCIL
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ACTING COMMISSIONER CHARLES RICHMAN
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INTERIM ORDER

September 26, 2007 Government Records Council Meeting

Martin O'Shea
Complainant

Complaint No. 2006-173

v.

Wayne Board of Education (Passaic)
Custodian of Record

At the September 26, 2007 public meeting, the Government Records Council ("Council") considered the September 19, 2007 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. Pursuant to N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i., the Custodian failed to provide a written response granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, resulting in a deemed denial. Thus, the Custodian has not borne his burden of proving the deemed denial was authorized by law pursuant to N.J.S.A. 47:1A-6.
2. The GRC must conduct an *in camera* review to decide whether or not the Custodian has lawfully denied access to redacted portions of the records responsive to the Complainant's September 6, 2006 OPRA request.
3. **The Custodian must deliver¹ to the Council in a sealed envelope six copies of the requested unredacted document (see #2 above), a document or redaction index², as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4, that the document provided is the document 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.**
4. Pursuant to O'Shea v. West Milford Board of Education, 391 N.J. Super. 534 (App. Div. 2007), the notes of executive session meetings requested by the

¹ The *in camera* documents may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as they arrive at the GRC office by the deadline.

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



Complainant's September 6, 2006 OPRA request are not subject to disclosure if any exist.

5. The Council defers a decision as to whether the Custodian's delay in access to the requested records rises to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances until after the conclusion of the an *in camera* review of the requested records.

Interim Order Rendered by the
Government Records Council
On The 26th Day of September, 2007

Vincent P. Maltese, Chairman
Government Records Council

I attest the foregoing is a true and accurate record of the Government Records Council.

David Fleisher, Secretary
Government Records Council

Decision Distribution Date: October 2, 2007

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
September 26, 2007 Council Meeting**

**Martin O'Shea¹
Complainant**

GRC Complaint No. 2006-173

v.

**Wayne Board of Education (Passaic)²
Custodian of Records**

Records Relevant to Complaint:

1. Any and all resolutions passed since May 1, 2006 by the Wayne Township Board of Education in accordance with N.J.S.A. 10:4-13 authorizing the exclusion of the public from any Board meetings.
2. Any and all minutes recorded or notes taken at any and all of the closed or executive sessions authorized by the resolutions that are responsive to Item No. 1.

Request Made: September 6, 2006

Response Made: September 13, 2006³

Custodian: Gary Ottmann

GRC Complaint Filed: September 19, 2006

Background

September 6, 2006

Complainant's Open Public Records Act ("OPRA") request. The Complainant requests the records relevant to this complaint listed above in a letter stating that the correspondence was a request for records pursuant to OPRA.⁴

September 13, 2006

Custodian's response to the OPRA request. The Custodian responds by telephone to the Complainant's OPRA request on the fifth (5th) business day following receipt of such request. The Custodian asserts that since the Board had not yet approved the records requested, the Custodian could not release them.

September 19, 2006

Denial of Access Complaint filed with the Government Records Council ("GRC") attaching Complainant's OPRA request dated September 6, 2006.

¹ No legal representation listed on record.

² No legal representation listed on record.

³ Custodian responded verbally.

⁴ Although the request was not on an official OPRA request form, OPRA applies because the Custodian undertook a response. See John Paff v. Borough of Audubon, GRC Complaint No. 2006-01 (March 2006).
Martin O'Shea v. Wayne Board of Education, 2006-173 – Findings and Recommendations of the Executive Director

The Complainant states that he submitted an OPRA request to the Custodian on September 6, 2006. The Complainant also states that the Custodian contacted him via telephone on September 13, 2006 and advised that the requested records had not been approved by the Board; therefore, the records could not be released yet. The Complainant asserts that he advised the Custodian to place this response in writing. The Complainant contends that he has not received written confirmation from the Custodian in regards to the September 13, 2006 telephone conversation. The Complainant further contends that the Custodian is in violation of N.J.S.A. 47:1A-5.i. The Complainant requests that the GRC find the Custodian in violation of OPRA and that the GRC order the Custodian to disclose all records relevant to this request.

September 26, 2006

Offer of Mediation sent to both parties.

September 27, 2006

Both parties agree to mediate this complaint.

November 3, 2006

Letter from Custodian to the Complainant with attachments.⁵ The Custodian advises the Complainant that he erred in his September 20, 2006⁶ response asserting that the records had not yet been approved by the Board. The Custodian further advises the Complainant that the records had not yet been redacted as opposed to not having been approved by the Board. The Custodian provides access to the redacted records to the Complainant.

November 30, 2006

Complaint referred back to the GRC from mediation.

December 19, 2006

Request for the Statement of Information sent to the Custodian. The GRC also grants the Custodian an extension until January 5, 2007 to file the Statement of Information.

January 4, 2007

Custodian's Statement of Information ("SOI") with the following attachments:

- Complainant's OPRA request dated September 6, 2006.
- Letter from the Custodian to the Complainant dated November 3, 2006.
- Redacted Wayne Board of Education minutes dated May 11, 2006 through August 24, 2006.

The Custodian asserts that this complaint is without factual basis because all records responsive were released to the Complainant on November 3, 2006. The Custodian also asserts that the records were subsequently released to the GRC on the same date.

⁵ This correspondence was included in the Custodian's SOI.

⁶Complainant asserts that he received only a verbal response to his OPRA request on September 13, 2006.
Martin O'Shea v. Wayne Board of Education, 2006-173 – Findings and Recommendations of the Executive Director

January 22, 2007

Letter from the GRC to the Custodian. The GRC requests that the Custodian submit a legal explanation and citation for the non-disclosure of redacted items in the requested records.

January 29, 2007

Letter from Custodian to the Complainant. The Custodian cites N.J.S.A. 47:1A-1.1 for the contention that grievances in connection with public employees, attorney-client privileges, and negotiations in connection with public employees are exempt from public disclosure.

A summary of the Complainant's requests and the Custodian's responses are detailed in the table below:

Complainant's Records Requested	Custodian's Response to Request
1. May 11, 2006 – Executive Minutes	Provided with redactions for information that is exempt as attorney client privileged due to outstanding litigation and collective bargaining negotiations.
2. May 25, 2006 – Executive Minutes	Provided with redactions for information that is exempt as public employee grievances, attorney client privileged, and collective bargaining negotiations.
3. June 8, 2006 – Executive Minutes	Provided without redactions.
4. June 14, 2006 – Executive Minutes	Provided with redactions for information that is exempt as public employee grievances, attorney client privileged, and collective negotiations.
5. June 15, 2006 – Executive Minutes	Provided without redactions.
6. June 27, 2006 – Executive Minutes	Provided without redactions.
7. July 13, 2006 – Executive Minutes	Provided with redactions for information that is exempt as public employee grievances and attorney client privileged.
8. July 20, 2006 – Executive Minutes	Provided with redactions for information that is exempt as attorney-client privileged.
9. August 17, 2006 – Executive Minutes	Provided with redactions for information that is exempt as attorney- client privileged.
10. August 24, 2006 – Executive Minutes	Provided without redactions.

June 22, 2007

E-mail from the GRC to the Custodian. The GRC requests that the Custodian submit a legal certification stating whether all records responsive to this request were disclosed to the Complainant.

July 13, 2007

Letter from the Custodian to the GRC. The Custodian certifies that he received the Complainant's OPRA request on September 6, 2006. The Custodian also certifies that on November 3, 2006, the Custodian produced all records responsive to the Complainant's September 6, 2006 OPRA request with redactions where necessary.

Analysis

Whether the Custodian unlawfully denied access to the requested records?

OPRA provides that:

"...government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, *with certain exceptions...*" (Emphasis added.) N.J.S.A. 47:1A-1.

Additionally, OPRA defines a government record as:

"... any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof, that has been *made, maintained or kept on file ... or that has been received* in the course of his or its official business ..." (Emphasis added.) N.J.S.A. 47:1A-1.1.

OPRA also 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. The custodian shall sign and date the form and provide the requestor with a copy thereof ..." N.J.S.A. 47:1A-5.g.

OPRA further provides that:

"[u]nless a shorter time period is otherwise provided by statute, regulation, or executive order, a custodian of a government record shall grant access ... or deny a request for access ... as soon as possible, but *not later than seven business days after receiving the request ...* In the event a custodian fails to respond within seven business days after receiving a request, *the failure to respond shall be deemed a denial of the request ...*" (Emphasis added.) N.J.S.A. 47:1A-5.i.

OPRA places the onus on the Custodian to prove that a denial of access is lawful. Specifically, OPRA states:

“... [t]he public agency shall have the burden of proving that the denial of access is authorized by law...” N.J.S.A. 47:1A-6.

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. 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.

OPRA requires that a custodian respond in writing to an OPRA request granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business day time frame. N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i., see also Kelley v. Rockaway Township, GRC Complaint No. 2006-176 (March 2007). Additionally, failure to respond to an OPRA request in writing within seven (7) business days results in a deemed denial of access. N.J.S.A. 47:1A-5.i.

In this complaint, the Complainant asserts that he did not receive a response in writing within the statutorily mandated seven (7) business days. The evidence of record shows that the Custodian responded verbally on the fifth (5th) business day following receipt of Complainant’s September 6, 2006 OPRA request. The Custodian’s failure to respond in writing to the Complainant’s September 6, 2006 OPRA request within the statutorily mandated time frame results in a deemed denial pursuant to N.J.S.A. 47:1A-5.i. Thus, the Custodian has violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. The Custodian has therefore failed to bear his burden that the denial of access was authorized by law. N.J.S.A. 47:1A-6.

Additionally, in Paff v. New Jersey Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005), the court found that the GRC had previously taken too narrow a view of its adjudicatory responsibilities in a situation when a Custodian asserted a broad exemption for nondisclosure or redaction of records. The court ruled that the “GRC has and should exercise its discretion to conduct *in camera* review when necessary to resolution the appeal.” *Id.* at 354. In this complaint, the Custodian also asserted broad exemptions supporting redaction of certain portions of the requested records. Therefore, the GRC must conduct an *in camera* review to decide whether the Custodian lawfully denied access to redacted portions of the records responsive to the Complainant’s November 6, 2006 OPRA request.

Finally, in O’Shea v. West Milford Board of Education, 391 N.J. Super. 534 (App. Div. 2007), the court held that informal, preliminary, handwritten notes taken at an executive session board meeting are not considered public records. Therefore, the notes of executive session meetings requested by the Complainant’s September 6, 2006 OPRA request are not subject to disclosure if any exist.

Whether the Custodian's delay in access to the requested records rises to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances?

The Council defers deciding on this matter until after the conclusion of an *in camera* review of the requested records.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Pursuant to N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i., the Custodian failed to provide a written response granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, resulting in a deemed denial. Thus, the Custodian has not borne his burden of proving the deemed denial was authorized by law pursuant to N.J.S.A. 47:1A-6.
2. The GRC must conduct an *in camera* review to decide whether or not the Custodian has lawfully denied access to redacted portions of the records responsive to the Complainant's September 6, 2006 OPRA request.
3. **The Custodian must deliver⁷ to the Council in a sealed envelope six copies of the requested unredacted document (see #2 above), a document or redaction index⁸, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4, that the document provided is the document 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.**
4. Pursuant to O'Shea v. West Milford Board of Education, 391 N.J. Super. 534 (App. Div. 2007), the notes of executive session meetings requested by the Complainant's September 6, 2006 OPRA request are not subject to disclosure if any exist.
5. The Council defers a decision as to whether the Custodian's delay in access to the requested records rises to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances until after the conclusion of the an *in camera* review of the requested records.

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⁷ The *in camera* documents may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as they arrive at the GRC office by the deadline.

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

Executive Director

September 19, 2007