



**State of New Jersey**  
**GOVERNMENT RECORDS COUNCIL**

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

**FINAL DECISION**

**June 25, 2008 Government Records Council Meeting**

Z.T.

Complaint No. 2007-262

Complainant

v.

Bernards Township Board of Education (Somerset)

Custodian of Record

At the June 25, 2008 public meeting, the Government Records Council ("Council") considered the June 18, 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, finds that:

1. The Custodian has complied with the Council's April 30, 2008 Interim Order by providing the requested transcript to the Complainant within five (5) business days of receipt of the Council's Interim Order as ordered by the GRC and by providing a subsequent certification to the GRC on May 9, 2008.
2. The Custodian responded to the Complainant's September 14, 2007 OPRA request on the second (2<sup>nd</sup>) business day following receipt of the request providing all records responsive, except for the record relevant to this complaint, which the Custodian asserted he was unable to provide. Although the Custodian initially failed to grant access to the requested transcript, the Custodian unknowingly provided the record as an attachment to the Statement of Information and complied with the Council's April 30, 2008 Interim Order within the time period specified therein. 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 25<sup>th</sup> Day of June, 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, Secretary  
Government Records Council

**Decision Distribution Date: July 2, 2008**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director  
June 25, 2008 Council Meeting**

**Z.T.<sup>1</sup>  
Complainant**

**GRC Complaint No. 2007-262**

v.

**Bernards Township Board of Education  
(Somerset)<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:** The official student transcript of V.T., which was illegally released on October 3, 2006 by V.T.'s counselor at Ridge High School, and possibly signed by Ms. K. Stocker, who was V.T.'s counselor at the time mentioned herein.<sup>3</sup>

**Request Made:** September 14, 2007

**Response Made:** September 18, 2007

**Custodian:** H. Ronald Smith

**GRC Complaint Filed:** October 18, 2007

**Background**

**April 30, 2008**

Government Records Council's ("Council") Interim Order. At its April 30, 2008 public meeting, the Council considered the April 23, 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. Because the Custodian inaccurately asserted that the requested record did not exist, the Custodian has unlawfully denied access to the requested transcript, thus violating N.J.S.A. 47:1A-5.i. Additionally, because the requested record does exist, the Custodian has failed to bear his burden of proof that this denial of access was authorized by law pursuant to N.J.S.A. 47:1A-6.

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

<sup>2</sup> Represented by Derlys M. Gutierrez, Esq., of Adams, Stern, Gutierrez & Lattiboudere, LLC. (Newark, NJ). The Custodian was previously represented by Rita F. Barone, Esq. (Bedminster, NJ).

<sup>3</sup> The request relevant to this complaint also included five (5) other items that are not contested by the Complainant. Additionally, the Complainant makes several references to the requested record being "illegally released." The GRC is not able to determine what the Complainant means by "illegally released," but the term is an argument used by the Complainant to display a possible explanation for why the Custodian may have unlawfully denied access to the requested record.

2. **The Custodian shall disclose the requested October 3, 2006 transcript with appropriate redactions, if any, and a redaction index detailing the general nature of the information redacted and the lawful basis for such redactions as required by N.J.S.A. 47:1A-6 and 47:1A-5.g.**
3. **The Custodian shall comply with Item No. 2 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director.**
4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

#### **April 30, 2008**

Council's Interim Order distributed to the parties.

#### **May 9, 2008**

Custodian Counsel's response to the Council's Interim Order. Counsel states that her law firm represents the Custodian in this complaint. Counsel certifies that she received the Council's April 30, 2008 Interim Order on May 6, 2008. Counsel certifies that she provided the requested transcript to the Complainant on May 9, 2008 and provided a subsequent certification to the GRC, thus complying with the Council's April 30, 2008 Interim Order.

#### **May 11, 2008**

Letter from the Complainant to the GRC. The Complainant asserts that there is sufficient evidence to support a determination that the Custodian knowingly and willfully violated OPRA. The Complainant further asserts that the GRC should make a final decision based on the evidence supporting the Custodian's violation of OPRA and not the Custodian's compliance with the Council's April 30, 2008 Interim Order.<sup>4</sup>

### **Analysis**

#### **Whether the Custodian complied with the Council's April 30, 2008 Interim Order?**

The Custodian's Counsel certifies that she received the Council's April 30, 2008 Interim Order on May 6, 2008. Counsel further certifies that she provided the requested transcript to the Complainant on May 9, 2008.

Based on the evidence of record, the Custodian has complied with the Council's April 30, 2008 Interim Order by providing the requested transcript to the Complainant

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<sup>4</sup> The Complainant summarizes a list of events that detail the "illegal release" of the requested record. Z.T. v. Bernards Township Board of Education, 2007-262 – Supplemental Findings and Recommendations of the Executive Director

within five (5) business days of receipt of the Council's Interim Order as ordered by the GRC and by providing a subsequent certification to the GRC on May 9, 2008.

**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?**

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:

"... If 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 at 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 (Berg); 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 (App. Div. 1996) at 107).

In this complaint, the Custodian responded to the Complainant's September 14, 2007 OPRA request on the second (2<sup>nd</sup>) business day following receipt of the request providing all records responsive, except for the record relevant to this complaint, which the Custodian asserted he was unable to provide. Although the Custodian initially failed to grant access to the requested transcript, the Custodian unknowingly provided the record as an attachment to the Statement of Information and complied with the Council's April 30, 2008 Interim Order within the time period specified therein. 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 April 30, 2008 Interim Order by providing the requested transcript to the Complainant within five (5) business days of receipt of the Council's Interim Order as ordered by the GRC and by providing a subsequent certification to the GRC on May 9, 2008.
  
2. The Custodian responded to the Complainant's September 14, 2007 OPRA request on the second (2<sup>nd</sup>) business day following receipt of the request providing all records responsive, except for the record relevant to this complaint, which the Custodian asserted he was unable to provide. Although the Custodian initially failed to grant access to the requested transcript, the Custodian unknowingly provided the record as an attachment to the Statement of Information and complied with the Council's April 30, 2008 Interim Order within the time period specified therein. 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

June 18, 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**

**April 30, 2008 Government Records Council Meeting**

Z.T.

Complaint No. 2007-262

Complainant

v.

Bernards Township Board of Education (Union)

Custodian of Record

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

1. Because the Custodian inaccurately asserted that the requested record did not exist, the Custodian has unlawfully denied access to the requested transcript, thus violating N.J.S.A. 47:1A-5.i. Additionally, because the requested record does exist, the Custodian has failed to bear his burden of proof that this denial of access was authorized by law pursuant to N.J.S.A. 47:1A-6.
2. **The Custodian shall disclose the requested October 3, 2006 transcript with appropriate redactions, if any, and a redaction index detailing the general nature of the information redacted and the lawful basis for such redactions as required by N.J.S.A. 47:1A-6 and 47:1A-5.g.**
3. **The Custodian shall comply with Item No. 2 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director.**
4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.



Interim Order Rendered by the  
Government Records Council  
On The 30<sup>th</sup> 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: April 30, 2008**



**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

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

**Z.T.<sup>1</sup>  
Complainant**

**GRC Complaint No. 2007-262**

v.

**Bernards Township Board of Education (Somerset)<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:** The official student transcript of V.T. illegally released on October 3, 2006 by V.T.'s counselor at Ridge High School, possibly signed by Ms. K. Stocker, who was V.T.'s counselor at the time mentioned herein.<sup>3</sup>

**Request Made:** September 14, 2007

**Response Made:** September 18, 2007

**Custodian:** H. Ronald Smith

**GRC Complaint Filed:** October 18, 2007

**Background**

**September 14, 2007**

Complainant's Open Public Records Act ("OPRA") request. The Complainant requests the records relevant to this complaint listed above on an official OPRA request form.<sup>4</sup>

**September 14, 2007**

E-mail from the Custodian to the Complainant. The Custodian states that he can not open the attached file in the Complainant's e-mail.

**September 15, 2007**

E-mail from the Complainant to the Custodian. The Complainant states that his OPRA request is attached as a PDF file, which should be easier to open.

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

<sup>2</sup> Represented by Rite F. Barone, Esq. (Bedminster, NJ).

<sup>3</sup> The request relevant to this complaint also included five (5) other items that are not contested by the Complainant. Additionally, the Complainant makes several references to the requested record being "illegally released." The GRC is not able to determine what the Complainant means by "illegally released," but the term is an argument used by the Complainant to display a possible explanation for why the Custodian may have unlawfully denied access to the requested record.

<sup>4</sup> The Complainant also faxed the request relevant to this complaint to the Custodian on September 14, 2007. The Custodian states in the Statement of Information that he received the request on that date.

**September 18, 2007**

Custodian's Response to the OPRA request. The Custodian responds in writing to the Complainant's OPRA request on the second (2<sup>nd</sup>) business day following receipt of such request. The Custodian provides all records responsive to the Complainant's request.<sup>5</sup>

**September 24, 2007**

E-mail from the Complainant to the Custodian. The Complainant states that the requested October transcript was not included in the package sent by the Custodian. The Complainant states that if the Custodian did not intentionally exclude the October transcript, thereby intentionally denying access to the requested record, then the Custodian can disclose the record to the Complainant.

**October 7, 2007**

E-mail from the Complainant to the Custodian. The Complainant states that he is in receipt of a letter from the Custodian postmarked October 2, 2007 in response to the Complainant's September 24, 2007 e-mail.<sup>6</sup> The Complainant states the Custodian has failed to provide the Complainant with the requested transcript, but has instead provided two (2) copies of a transcript dated June 27, 2007.

The Complainant states that he has given the Custodian an opportunity to provide the requested record following the Complainant's September 24, 2007 e-mail, but that the Custodian has failed to do so. The Complainant asserts that the Custodian has deliberately and repeatedly denied the Complainant's request for the record relevant to this complaint without an explanation.

**October 10, 2007**

Letter from the Custodian to the Complainant. The Custodian states that he is unable to provide a copy of the October transcript because as records are updated in the student management system, previous versions of the transcript can no longer be captured.

The Custodian states that he was able to find the attached transcript dated July 6, 2006, which was identical to the October 3, 2006 transcript, and attaches a copy.

**October 18, 2007**

Denial of Access Complaint filed with the Government Records Council ("GRC") with the following attachments:

- Complainant's OPRA request dated September 14, 2007.
- Copy of V.T.'s transcript dated June 27, 2007.
- E-mail from the Complainant to the Custodian dated September 14, 2007.
- E-mail from the Custodian to the Complainant dated September 14, 2007.

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<sup>5</sup> The Custodian provides a FedEx US Airbill in the Statement of Information as proof that the requested records were sent on September 18, 2007. The Complainant states in his Denial of Access Complaint that he received the Custodian's response on September 23, 2007.

<sup>6</sup> The referenced letter was not provided to the GRC in either the Complainant's Denial of Access Complaint or the Custodian's Statement of Information.

- E-mail from the Complainant to the Custodian dated September 15, 2007.
- E-mail from the Complainant to the Custodian dated September 24, 2007.
- E-mail from the Complainant to the Custodian dated October 7, 2007.
- Letter from the Custodian to the Complainant dated October 10, 2007, attaching a copy of V.T.'s transcript dated July 6, 2006.

The Complainant states that he submitted an OPRA request to the Custodian via facsimile on September 14, 2007. The Complainant states that he received a response from the Custodian on September 23, 2007, but that the record relevant to this complaint was not included. The Complainant states that the Custodian provided a copy of V.T.'s transcript dated June 27, 2007 and provided no explanation as to why the transcript dated October 3, 2006 was not provided.

The Complainant states that he sent an e-mail to the Custodian on September 24, 2007 requesting that the Custodian provide the requested transcript, but received an additional copy of the June 27, 2007 transcript again, with no explanation from the Custodian. The Complainant states that he e-mailed the Custodian on October 7, 2007 asserting that the Custodian had deliberately and repeatedly denied access to the Complainant's request without an explanation. The Complainant states that on October 10, 2007, the Custodian provided an unofficial transcript dated July 6, 2006 that the Complainant did not request.

The Complainant states that the Custodian's letter contends that the October 3, 2006 transcript cannot be provided because once transcripts are updated electronically, previous versions of the transcript can no longer be captured. The Complainant contends that the Custodian's assertion is misleading and is only a pretext for an unauthorized denial of access to the requested transcript. The Complainant asserts that the Custodian's ability to produce a transcript dated July 6, 2006 proves that the Custodian's argument is invalid. The Complainant also asserts that the Custodian's statement that the July 6, 2006 transcript is identical to the requested transcript is a pretext for an unauthorized denial of access.

The Complainant asserts that if the Custodian believed that the July 6, 2006 transcript was identical to the requested October 3, 2006 transcript, then why would the Custodian twice send a copy of the June 27, 2007 transcript to the Complainant?<sup>7</sup> The Complainant asserts that the Bernards Board of Education ("BBOE") and Custodian both understand the significant difference between an "illegally released" transcript dated October 3, 2006 and an unofficial copy of a transcript dated July 6, 2006. The Complainant finally contends that the Custodian is withholding the requested transcript to cover the BBOE's alleged illegal release of V.T.'s transcript, and have thus violated the Complainant's rights under OPRA.

### **November 7, 2007**

Offer of Mediation sent to both parties.

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<sup>7</sup> The June 27, 2007 transcript was sent with the original response received by the Complainant on September 24, 2007 and again in a postmarked correspondence dated October 2, 2007 that was not provided to the GRC.

**November 10, 2007**

The Custodian agreed to mediate this complaint. The Complainant did not respond to the Offer of Mediation.

**November 26, 2007**

Request for the Statement of Information sent to the Custodian.

**December 6, 2007**

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

- Complainant's OPRA request dated September 14, 2007.
- FedEx US Airbill dated September 18, 2007 attaching records responsive to Complainant's request.
- Copy of a discrimination complaint against the BBOE filed by the Complainant's spouse.

The Custodian certifies that his search for the requested records included finding all letters and memo requested, accessing student transcripts and providing the requested records. The Custodian also certifies that all records responsive must be retained permanently by the BBOE.

The Custodian asserts that he was only able to provide an unofficial transcript dated July 6, 2007. The Custodian asserts that he has complied completely and that the Complainant's continued requests for non-existent records is harassment against the BBOE.

**March 5, 2008**

The Complainant's Response to the Custodian's SOI.<sup>8</sup> The Complainant asserts that the Custodian failed to provide the SOI to the Complainant for almost three (3) months after signing the SOI certification which stated that the SOI was simultaneously sent to the Complainant.

The Complainant further contends that the Custodian willfully lied when he averred that all requested records were provided to the Complainant. The Complainant asserts that he was provided with two (2) separate transcripts that were not responsive to the Complainant's request. The Complainant further contends that the Custodian's assertion that the transcript dated October 3, 2006 does not exist is untrue because the requested transcript is included as an attachment to the copy of the discrimination complaint included as part of the SOI.

The Complainant asserts that the Custodian's actions were knowing and willful. The Complainant contends that the Custodian willfully denied access to the requested record because the BBOE was attempting to conceal its alleged illegal release of V. T.'s transcript. The Complainant further contends that the Custodian's failure to provide the SOI to the Complainant was calculated to hinder the Complainant's ability to refute the

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<sup>8</sup> The Complainant attached additional documents in his response to the Custodian's SOI which are not relevant to this complaint.

Custodian's arguments which include concealing the BBOE's willful denial of access, obstructing the GRC's process and accusing the Complainant of harassing the Custodian through OPRA. The Complainant further asserts that the Custodian's accusation that Complainant is harassing the Custodian for non-existent records is baseless because the requested transcript does exist.

### Analysis

#### **Whether the Custodian unlawfully denied access to the requested record?**

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. N.J.S.A. 47:1A-1.1. A custodian must release all records responsive to an OPRA request “with certain exceptions.” N.J.S.A. 47:1A-1. Additionally, OPRA places the burden on a custodian to prove that a denial of access to records is lawful pursuant to N.J.S.A. 47:1A-6.

In the complaint before the Council, the Complainant contends that the Custodian deliberately withheld access to the requested transcript in order to conceal the BOE’s alleged illegal release of V.T.’s October 3, 2006 transcript. The Custodian contends that once a transcript is updated, previous versions of transcripts cannot be recaptured. The Custodian provided two (2) copies of a transcript dated June, 27, 2007 and one (1) copy of a transcript dated July 6, 2006, which the Custodian claims is identical to the requested record.

Further, the Custodian attached to the SOI a complaint filed by the Complainant’s spouse with the United States Department of Education, Office for Civil Rights, which was closed in November 2006. This complaint was filed against BBOE because the BBOE failed to nominate V.T. for an award. The GRC received the October 3, 2006 transcript responsive to this complaint attached to the SOI.

Because the Custodian inaccurately asserted that the requested record did not exist, the Custodian has unlawfully denied access to the requested transcript, thus violating N.J.S.A. 47:1A-5.i. Additionally, because the requested record does exist, the Custodian has failed to bear his burden of proof that this denial of access was authorized by law pursuant to N.J.S.A. 47:1A-6.

The Custodian should, therefore, disclose the requested October 3, 2006 transcript to the Complainant with any necessary redactions and provide a general nature description of those redactions, if necessary, as well as the lawful basis for such redactions, pursuant to N.J.S.A. 47:1A-6 and N.J.S.A. 47:1A-5.g.

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

**Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. Because the Custodian inaccurately asserted that the requested record did not exist, the Custodian has unlawfully denied access to the requested transcript, thus violating N.J.S.A. 47:1A-5.i. Additionally, because the requested record

does exist, the Custodian has failed to bear his burden of proof that this denial of access was authorized by law pursuant to N.J.S.A. 47:1A-6.

2. **The Custodian shall disclose the requested October 3, 2006 transcript with appropriate redactions, if any, and a redaction index detailing the general nature of the information redacted and the lawful basis for such redactions as required by N.J.S.A. 47:1A-6 and 47:1A-5.g.**
3. **The Custodian shall comply with Item No. 2 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director.**
4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Prepared By:

Frank F. Caruso  
Case Manager

Approved By:

Catherine Starghill, Esq.  
Executive Director

April 23, 2008