



## State of New Jersey

GOVERNMENT RECORDS COUNCIL

101 SOUTH BROAD STREET

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TRENTON, NJ 08625-0819

CHRIS CHRISTIE  
Governor

KIM GUADAGNO  
Lt. Governor

LORI GRIFA  
Commissioner

### FINAL DECISION

#### December 20, 2011 Government Records Council Meeting

Sabino Valdes  
Complainant

Complaint No. 2010-180

v.

Union City Board of Education (Hudson)  
Custodian of Record

At the December 20, 2011 public meeting, the Government Records Council (“Council”) considered the December 13, 2011 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. Because the Custodian’s response to the Complainant’s OPRA request failed to specify a lawful basis for a denial to this current OPRA request, the Custodian’s response to the Complainant’s request was insufficient pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., O’Shea v. Township of West Milford, GRC Complaint No. 2004-17 (April 2005) and Caggiano v. Borough of Stanhope (Sussex), GRC Complaint No. 2005-211 (January 2006).
2. Because the Custodian certified in the Statement of Information that he could not locate the requested tenure charges dated August 2, 2000, and because the Complainant has provided no evidence to refute the Custodian’s certification, and because the Council has previously determined in Rivera v. Union City Board of Education (Hudson), GRC Complaint No. 2008-112 (August 2009) that said tenure charges do not exist, the Custodian has not unlawfully denied the Complainant access to the requested records pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005). N.J.S.A. 47:1A-6.
3. The Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. by providing an insufficient response to the Complainant’s OPRA request because the Custodian did not provide a lawful basis for a denial. However, the Custodian certified in the Statement of Information that the requested tenure charges dated August 2, 2000 could not be located and thus do not exist. Additionally, the evidence of record does not indicate that the Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and an unreasonable denial of access under the totality of the circumstances.



This is the final administrative determination in this matter. Any further review should be pursued in the Appellate Division of the Superior Court of New Jersey within forty-five (45) days. Information about the appeals process can be obtained from the Appellate Division Clerk's Office, Hughes Justice Complex, 25 W. Market St., PO Box 006, Trenton, NJ 08625-0006. Proper service of submissions pursuant to any appeal is to be made to the Council in care of the Executive Director at the State of New Jersey Government Records Council, 101 South Broad Street, PO Box 819, Trenton, NJ 08625-0819.

Final Decision Rendered by the  
Government Records Council  
On The 20<sup>th</sup> Day of December, 2011

Robin Berg Tabakin, Chair  
Government Records Council

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

Denise Parkinson Vetti, Secretary  
Government Records Council

**Decision Distribution Date: December 22, 2011**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
December 20, 2011 Council Meeting**

**Sabino Valdes<sup>1</sup>  
Complainant**

**GRC Complaint No. 2010-180**

v.

**Union City Board of Education (Hudson)<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:** Copy of the tenure charges served upon the Complainant by the Union City Board of Education on or about August 2, 2000, including the required statement of evidence under oath pursuant to N.J.S.A. 18A:6-11 and the jurat stating the date and before what authority the deposition was made.<sup>3</sup>

**Request Made:** June 22, 2010

**Response Made:** June 29, 2010

**Custodian:** Anthony Dragona

**GRC Complaint Filed:** July 27, 2010<sup>4</sup>

**Background**

**June 22, 2010**

Complainant's Open Public Records Act ("OPRA") request. The Complainant requests the record relevant to this complaint listed above on an official OPRA request form.

**June 29, 2010**

Custodian's response to the OPRA request. The Custodian responds in writing to the Complainant's OPRA request on the fifth (5<sup>th</sup>) business day following receipt of such request.<sup>5</sup> The Custodian states that access to the requested record is denied because the Complainant has already been provided with the only copies of the tenure charges dated April 2000 and August 2000 that can be located.

**July 27, 2010**

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

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

<sup>2</sup> Represented by Susanne Lavelle, Esq. (Union City, NJ)

<sup>3</sup> Although the Complainant is seeking tenure charges dated August 2, 2000, the evidence of record indicates that the only record responsive to the Complainant's OPRA request is date stamped August 2000.

<sup>4</sup> The GRC received the Denial of Access Complaint on said date.

<sup>5</sup> The Custodian received the Complainant's OPRA request on June 22, 2010.

- Complainant's OPRA request dated June 22, 2010
- Custodian's response to the Complainant's OPRA request dated June 29, 2010

The Complainant argues that N.J.S.A. 18A:6-11 states that:

“any charges made against any employee of a board of education under tenure during good behavior and efficiency shall be filed with the secretary of the board in writing, and a written statement of evidence under oath to support such charge shall be presented to the board. The board of education shall forthwith provide such employee with a copy of the charge, a copy of the statement of evidence and an opportunity to submit a written statement of position and a written statement of evidence under oath with respect thereto. After consideration of the charge, statement of position and statement of evidence presented to it, the board shall determine by a majority vote of its full membership whether there is probable cause to credit the evidence in support of the charge...”

The Complainant also argues that N.J.S.A. 18A:6-13 states “if the board does not make such a determination within forty-five (45) days...the charge shall be deemed dismissed and no further proceedings or actions shall be taken thereon.” The Complainant further argues that N.J.S.A. 18A:6-11 states that “in the event the board finds such probable cause exists and that the charge...is sufficient to warrant dismissal...then it shall forward such charge to the [Department of Education] for a hearing pursuant to N.J.S.A. 18A:6-16.”

The Complainant states that on April 27, 2000 the Union City Board of Education (“UCBOE”) filed tenure charges against the Complainant. The Complainant also states that the UCBOE failed to find probable cause to certify those charges within forty-five (45) days as required by N.J.S.A. 18A:6-14. The Complainant further states that on or about August 2, 2000 the UCBOE again served tenure charges on the Complainant, identical to those served in April. The Complainant states that the UCBOE changed the date of the tenure charges from April 27, 2000 to August 2, 2000. Lastly, the Complainant states that this action allowed the UCBOE to re-start the forty-five (45) day clock as if the April 27, 2000 filing of tenure charges never happened.

The Complainant states that on March 19, 2009, the New Jersey Department of Education (“DOE”) sent the Complainant a letter stating that the UCBOE had inadvertently filed the tenure charges, which expired when they were not certified within the statutorily mandated forty-five (45) days.<sup>6</sup> The Complainant also states that the DOE informed the Complainant that after reviewing its file, the DOE determined that the UCBOE certified the tenure charges dated April 27, 2000 and not the tenure charges dated August 2, 2000. The Complainant further states that the DOE did not notice the failure of the UCBOE to certify the August 2, 2000 tenure charges. The Complainant states that according to the DOE, the DOE does not have the *original* August 2, 2000 tenure charges, however the DOE does have a copy of the August 2, 2000 tenure

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<sup>6</sup> The Complainant includes a copy of the letter from the Department of Education to the Complainant dated March 19, 2009.

charges which were marked as an exhibit and sent to the Complainant on March 10, 2008.

The Complainant asserts that the UCBOE must possess the record responsive to his OPRA request. The Complainant states that he filed an OPRA request on June 22, 2010 for the requested record. The Complainant also states that the Custodian responded to the Complainant's OPRA request stating that the Complainant was previously provided with the only copies of the August 2000 tenure charges that can be located.

The Complainant argues that the DOE informed him that it was never served with the original tenure charges which were filed and served upon the Complainant by the UCBOE on or about August 2, 2000. The Complainant asserts that the Board must have the original set of tenure charges, which were dated and notarized on or about August 2, 2000. The Complainant also asserts that absence of this record responsive would prove that: 1) the UCBOE purposely destroyed this instrument, and 2) on May 6, 2002 the UCBOE knowingly offered a forged instrument at a hearing at the Office of Administrative Law ("OAL") as a device to mislead OAL.

The Complainant does not agree to mediate this complaint.

**August 3, 2010**

Request for the Statement of Information ("SOI") sent to the Custodian.

**August 10, 2010**

Custodian's SOI with the following attachments:

- Complainant's OPRA request dated June 22, 2010
- Custodian's response to the Complainant's OPRA request dated June 29, 2010.

The Custodian certifies that on June 22, 2010 the UCBOE received an OPRA request from the Complainant, a former employee of the UCBOE, seeking a copy of tenure charges filed upon the Complainant on August 2, 2000, including the required statement of evidence under oath swearing that the statement is true pursuant to N.J.S.A. 18A:6-11 and a jurat stating when and before what authority the deposition was made. The Custodian also certifies that on June 29, 2010 he advised the Complainant that his request was denied because the Complainant was previously provided with the only copies of the tenure charges dated April 2000 and August 2000 that can be located. The Custodian certifies that he denied the Complainant's request because the only copy of the requested record, tenure charges dated August 2000 that can be located, had already been provided to the Complainant. The Custodian also certifies that the Complainant conducted an on-site inspection on December 23, 2008 and was provided a copy of the August 2000 tenure charges. Additionally, the Custodian certifies that a copy of tenure charges dated August 2000 was provided to the Complainant on January 6, 2009.<sup>7</sup>

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<sup>7</sup>The Custodian attaches a copy of the tenure charges dated August 2000.

The Custodian certifies that the Complainant has filed several OPRA requests for the August 2000 tenure charges dating back to November 15, 2007. The Custodian certifies that he conducted an extensive review of the UCBOE files numerous times in an attempt to locate a copy of the requested tenure charges. The Custodian also certifies that since the Complainant made his first OPRA request for this record responsive over two (2) years ago, it is impossible to estimate the amount of hours expended in such search because UCBOE employees are not required to keep a detailed accounting of each hour spent on a particular assignment. The Custodian further certifies that he cannot possibly certify with any degree of accuracy the amount of time expended in total for the search of this record. The Custodian certifies that despite the two (2) searches conducted by the UCBOE for this record and the two (2) on-site inspections conducted by the Complainant, the only copy of the requested record that can be located within the twenty-seven (27) boxes of files maintained by the UCBOE regarding this matter was provided to the Complainant on January 6, 2000. Lastly, the Custodian certifies that the Complainant is requesting a copy of the record responsive that cannot be located.

Lastly, the Custodian argues that he could not have violated OPRA because he provided the only copy of the requested record that he could locate or because the UCBOE is unable to produce a record that is not in its possession and perhaps never was in its possession.<sup>8</sup> See N.J.S.A. 47:1A-6; Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005); O’Shea and Paff v. Borough of Emerson, 2008 WL 2328239 (Law. Div. 2008); Paff v. New Jersey Department of Labor, 392 N.J. Super. 333, 341 (App. Div. 2008); Paff v. New Jersey Department of Labor, 392 N.J. Super. 333, 341 (App. Div. 2007); Bent v. Township of Strafford Police Dept., 381 N.J. Super. 30, 39 (App. Div. 2005).

The Custodian also provides the following Document Index in response to Item No. 9:

(A) List of all records responsive to Complainant’s OPRA request (include the number of pages for each record).	(B) List the Records Retention Requirement and Disposition Schedule for each record responsive to the Complainant’s OPRA request.	(C) List of all records provided to Complainant, in their <u>entirety</u> or <u>with redactions</u> (include the <u>date</u> such records were provided).	(D) If the records were disclosed with redactions, give a general nature description of the record.	(E) If the records were denied in their entirety, give a general nature description of the record.	(F) List the legal explanation and statutory citation for the denial of access to records in their <u>entirety</u> or <u>with redactions</u> .
Copy of the set of tenure	Records Retention	August 2, 2000 tenure	N/A.	OPRA request	Most recent OPRA

<sup>8</sup> The Custodian certifies that he provided a copy of tenure charges dated August 2000 to the Complainant. The Custodian certifies that the Complainant is seeking a copy of tenure charges dated August 2, 2000. Sabino Valdes v. Union City Board of Education (Hudson), 2010-180 – Findings and Recommendations of the Executive Director 4

<p>charges served upon the Complainant by the Union City Board of Education on or about August 2, 2000, including the required statement of evidence under oath pursuant to <u>N.J.S.A. 18A:6-11</u> and the jurat stating when and before what authority the deposition was made. (73 pages)</p>	<p>Requirement: six (6) years after termination of employment provided employment history card is maintained; otherwise eighty (80) years.</p>	<p>charges filed against the Complainant provided to the Complainant on January 6, 2009</p>		<p>dated June 21, 2010 was denied as the only copy of this document that could be located had previously been provided to the Complainant on January 6, 2009.</p>	<p>request was denied because only copy of record in UCBOE's possession was already provided on January 6, 2009. The Complainant is requesting a copy of the same record with certain notations that cannot be located. <u>N.J.S.A. 47:1A-6.</u></p>
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**September 26, 2011**

E-mail from the GRC to Custodian's Counsel. The GRC requests that the Custodian legally certify as to 1) whether a copy of the August 2000 tenure charges was already provided to the Complainant, and 2) what type of search was conducted to locate a set of tenure charges dated and sworn to on August 2, 2000. The GRC also requests that the Custodian include how long he searched for the records and where he searched for the records. Lastly, the GRC requests the Custodian to certify whether a copy of the tenure charges dated August 2, 2000 were ever located.

**September 28, 2011**

Facsimile from the Custodian's Counsel to the GRC. Counsel encloses a copy of the requested certification from the Custodian.

The Custodian certifies that on June 21, 2010 the Complainant filed an OPRA request for the records listed in his Denial of Access Complaint. The Custodian also certifies that the Complainant was provided with a copy of the August 2000 tenure charges on January 6, 2009 in response to an earlier OPRA request. The Custodian further certifies that the August 2000 tenure charges are the only records that can be located despite an extensive and repeated search of the UCBOE's files.

The Custodian certifies that his assistant, Board counsel and the Custodian have expended considerable time searching through twenty-seven (27) boxes of documents on Sabino Valdes v. Union City Board of Education (Hudson), 2010-180 – Findings and Recommendations of the Executive Director

more than one occasion to locate the August 2, 2000 tenure charges, inclusive of the required statement of evidence under oath swearing that the statement is true pursuant to N.J.S.A. 18A:6-11 and a jurat stating when and before what authority the deposition was made. The Custodian also certifies that since the Complainant has requested this record many times since 2007, it is impossible to estimate the hours expended, as Board employees do not and are not required to keep a detailed accounting of each hour spent on a particular assignment. In addition, the Custodian certifies that he cannot certify with any degree of accuracy the amount of time expended in total for the search of the requested records.

Lastly, the Custodian certifies that despite the searches conducted by UCBOE and the Complainant's two (2) on-site inspections, the only copy of the August 2000 tenure charges filed against the Complainant that can be located within the UCBOE's files was provided to him on January 6, 2009.<sup>9</sup>

### Analysis

#### **Whether the Custodian's response to the Complainant's OPRA request on June 29, 2011 was sufficient?**

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

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<sup>9</sup> The Custodian does not certify as to whether a copy of the tenure charges dated August 2, 2000 were ever located.  
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“...[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.

The evidence of record indicates that the Custodian responded to the Complainant’s OPRA request within seven (7) business days. The evidence of record also indicates that the Custodian denied access to the requested record because a copy of the August 2000 tenure charges was previously provided to the Complainant.<sup>10</sup> The Custodian certifies in the SOI that the Complainant was provided a copy of the August 2000 tenure charges on January 6, 2009 pursuant to a separate OPRA request.

OPRA states, “the custodian shall indicate the specific basis therefor on the request form and promptly return it to the requestor.” N.J.S.A. 47:1A-5.g.

In O’Shea v. Township of West Milford, GRC Complaint No. 2004-17 (April 2005), the Custodian’s initial response stating that the Complainant’s request was a duplicate of a previous request was legally insufficient because the Custodian has a duty to answer each request item individually. The Council reasoned that “[b]ased on OPRA and the GRC’s holding in O’Shea, a custodian is vested with the responsibility to respond to each individual request item within seven (7) business days after receipt of such request.” Therefore, the Custodian has violated N.J.S.A. 47:1A-5.g.” See also Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2008-166 (April 2009) and Kulig v. Cumberland County Board of Chosen Freeholders, GRC Complaint No. 2008-263 (November 2009).

In Caggiano v. Borough of Stanhope (Sussex), GRC Complaint No. 2005-211 (January 2006), the complainant filed numerous OPRA requests for the same records in each request. The custodian responded to the complainant stating that the records were previously provided to the complainant in 2002 and 2003 on repeated occasions. The Council held that “the fact that the records were previously provided to the Complainant on several occasions is not a lawful basis to deny access to the records requests.”

In the instant complaint, the Custodian responded to the Complainant’s OPRA request stating that the only copies of the August 2000 tenure charges that can be located were already provided to the Complainant. The Custodian certified that the Complainant was provided copies of these records, tenure charges dated August 2000, on January 6, 2009.

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<sup>10</sup> The Complainant is seeking copies of tenure charges dated August 2, 2000, not dated August 2000. Sabino Valdes v. Union City Board of Education (Hudson), 2010-180 – Findings and Recommendations of the Executive Director

Because the Custodian's response to the Complainant's OPRA request failed to specify a lawful basis for a denial to this current OPRA request, the Custodian's response to the Complainant's request was insufficient pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., O'Shea v. Township of West Milford, GRC Complaint No. 2004-17 (April 2005), and Caggiano v. Borough of Stanhope (Sussex), GRC Complaint No. 2005-211 (January 2006) .

**Whether the Custodian unlawfully denied access to the requested tenure charges dated August 2, 2000?**

The Complainant filed an OPRA request for a copy of the tenure charges served upon the Complainant by the UCBOE on or about August 2, 2000, including the required statement of evidence under oath pursuant to N.J.S.A. 18A:6-11 and the jurat stating the date when and before what authority the deposition was made. The Custodian certified that his assistant and Custodian's Counsel expended a considerable amount of time searching through twenty-seven (27) boxes of records on more than one occasion in an attempt to locate the August 2, 2000 tenure charges. The Custodian also certified that the Complainant made two (2) on-site inspections for the requested records. The Custodian further certified that the Complainant has made numerous requests for copies of the tenure charges dated August 2000 since 2007. The Custodian additionally certified that it is impossible to estimate the amount of hours spent in an attempt to locate the records responsive to the Complainant's OPRA request. The Custodian also certified that he provided the Complainant with a copy of tenure charges dated August 2000 on January 6, 2000 in response to an earlier OPRA request. Lastly, the Custodian certified in the SOI that the requested tenure charges dated August 2, 2000 could not be located.

In Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005), the complainant sought telephone billing records showing a call made to him from the New Jersey Department of Education. The Custodian responded stating that there was no record of any telephone calls made to the Complainant. The Custodian subsequently certified that no records responsive to the Complainant's request existed. The Complainant failed to submit any evidence to refute the Custodian's certification. The GRC held that the Custodian did not unlawfully deny access to the requested records because the Custodian certified that no records responsive to the request existed.

Furthermore, in Rivera v. Union City Board of Education (Hudson), GRC Complaint No. 2008-112 (August 2009), the complainant requested tenure charges filed against Union City Board of Education employee, Sabino Valdes, dated August 2, 2000. The Council noted that "the Custodian certified that neither the BOE nor the subject of said charges has located the requested records in any of the 27 boxes believed to contain said records. As such, the Custodian asserts that said tenure charges do not exist."<sup>11</sup> The Council held that because the Custodian certified that there are no records responsive to the Complainant's request for tenure charges filed against Sabino Valdes dated August 2, 2000, and there was no credible evidence in the record to refute the Custodian's

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<sup>11</sup> The Custodian in Rivera v. Union City Board of Education (Hudson), GRC Complaint 2008-112 (August 2009) is the Custodian for the present Denial of Access Complaint.  
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certification, the Custodian's denial of access was authorized by law pursuant to N.J.S.A. 47:1A-6 and Pusterhofer, supra.

Rivera, supra, is dispositive of the current Denial of Access Complaint. The Custodian herein certified that neither he nor the Complainant could locate the tenure charges dated August 2, 2000. In addition, the Custodian certified that a considerable amount of hours were spent looking through twenty-seven (27) boxes in an attempt to locate said tenure charges. Lastly, the Custodian certified in the SOI that the tenure charges dated August 2, 2000 responsive to the Complainant's OPRA request could not be located.

Therefore, because the Custodian has certified in the SOI that he could not locate the requested tenure charges dated August 2, 2000, and because the Complainant has provided no evidence to refute the Custodian's certification, and because the Council has previously determined in Rivera v. Union City Board of Education (Hudson), GRC Complaint No. 2008-112 (August 2009) that said tenure charges do not exist, the Custodian has not unlawfully denied the Complainant access to the requested records pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005). N.J.S.A. 47:1A-6.

**Whether the Custodian's insufficient response to the Complainant's request 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.

The evidence of record indicates that the Complainant filed his OPRA request on June 22, 2010. The evidence of record further indicates that the Custodian timely responded to the Complainant's OPRA request denying access because the Complainant was previously provided a copy of the tenure charges dated August 2000. Furthermore, the Custodian certified in the SOI that the requested tenure charges dated August 2, 2000 could not be located after an extensive search for such records.

Certain legal standards must be considered when making the determination of whether the Custodian's actions rise to the level of a "knowing and willful" violation of OPRA. The following statements must be true for a determination that the Custodian "knowingly and willfully" violated OPRA: the Custodian's actions must have been much more than negligent conduct (Alston v. City of Camden, 168 N.J. 170, 185 (2001); the Custodian must have had some knowledge that his actions were wrongful (Fielder v. Stonack, 141 N.J. 101, 124 (1995)); the Custodian's actions must have had a positive element of conscious wrongdoing (Berg v. Reaction Motors Div., 37 N.J. 396, 414 (1962)); the Custodian's actions must have been forbidden with actual, not imputed, knowledge that the actions were forbidden (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, 107 (App. Div. 1996)).

The Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. by providing an insufficient response to the Complainant's OPRA request because the Custodian did not provide a lawful basis for a denial. However, the Custodian certified in the SOI that the requested tenure charges dated August 2, 2000 could not be located and thus do not exist. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and an unreasonable denial of access under the totality of the circumstances.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. Because the Custodian's response to the Complainant's OPRA request failed to specify a lawful basis for a denial to this current OPRA request, the Custodian's response to the Complainant's request was insufficient pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., O'Shea v. Township of West Milford, GRC Complaint No. 2004-17 (April 2005) and Caggiano v. Borough of Stanhope (Sussex), GRC Complaint No. 2005-211 (January 2006).
2. Because the Custodian certified in the Statement of Information that he could not locate the requested tenure charges dated August 2, 2000, and because the Complainant has provided no evidence to refute the Custodian's certification, and because the Council has previously determined in Rivera v. Union City Board of Education (Hudson), GRC Complaint No. 2008-112 (August 2009) that said tenure charges do not exist, the Custodian has not unlawfully denied the Complainant access to the requested records pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005). N.J.S.A. 47:1A-6.
3. The Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. by providing an insufficient response to the Complainant's OPRA request

because the Custodian did not provide a lawful basis for a denial. However, the Custodian certified in the Statement of Information that the requested tenure charges dated August 2, 2000 could not be located and thus do not exist. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and an unreasonable denial of access under the totality of the circumstances.

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Executive Director

December 13, 2011