



**State of New Jersey**  
GOVERNMENT RECORDS COUNCIL  
101 SOUTH BROAD STREET  
PO BOX 819  
TRENTON, NJ 08625-0819

CHRIS CHRISTIE  
Governor

KIM GUADAGNO  
Lt. Governor

LORI GRIFA  
Commissioner

**FINAL DECISION**

**May 24, 2011 Government Records Council Meeting**

Michael R. Schiavoni  
Complainant

Complaint No. 2010-73

v.

Sparta Township School District (Sussex)  
Custodian of Record

At the May 24, 2011 public meeting, the Government Records Council (“Council”) considered the April 20, 2011 *Reconsideration* 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 having now supplied the Council with a copy of the 2009-2010 Sparta School District Calendar as evidence that the Sparta School District was closed for business on February 15, 2010, the Council hereby finds that the Custodian’s response to the Complainant’s February 4, 2010 OPRA request on February 16, 2010 was made on the seventh (7<sup>th</sup>) business day upon receipt of such request. Therefore, the Custodian has complied with OPRA’s requirement that the Custodian either grants or denies access to requested records within seven (7) business days from receipt of said request. N.J.S.A. 47:1A-5.i. The Council’s decision dated January 25, 2011 is therefore amended to delete paragraph #1 of the Conclusions and Recommendations.

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 24<sup>th</sup> Day of May, 2011

Robin Berg Tabakin, Chair  
Government Records Council



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

Charles A. Richman, Secretary  
Government Records Council

**Decision Distribution Date: June 1, 2011**

**STATE OF NEW JERSEY**  
**GOVERNMENT RECORDS COUNCIL**  
*Reconsideration*  
**Supplemental Findings and Recommendations of the Executive Director**  
**May 24, 2011 Council Meeting**

**Michael R. Schiavoni**<sup>1</sup>  
**Complainant**

**GRC Complaint No. 2010-73**

v.

**Sparta Township School District (Sussex)**<sup>2</sup>  
**Custodian of Records**

**Records Relevant to Complaint:** Copies of documents to which Sparta Township Board of Education (“BOE”) member, Mr. Kevin Pollison, referred in his comments at the January 25, 2010 Board of Education meeting regarding Sparta Township School District performance on New Jersey standardized tests versus other New Jersey school districts.

**Request Made:** February 4, 2010

**Response Made:** February 16, 2010

**Custodian:** Dr. Warren S. Ceurvels

**GRC Complaint Filed:** March 19, 2010<sup>3</sup>

**Background**

**January 25, 2011**

Government Records Council’s (“Council”) Interim Order. At its January 25, 2011 public meeting, the Council considered the January 18, 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, found that:

1. The Complainant’s failure to provide a written response to the Complainant’s request within the statutorily mandated seven (7) business days of receipt thereof results in a “deemed” denial pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).
2. Because the requested records comprise notes used as a memory aid to facilitate comments made during a Board of Education meeting, and

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

<sup>2</sup> Represented by Rodney T. Hara, Esq., Fogarty & Hara (Fair Lawn, NJ).

<sup>3</sup> The GRC received the Denial of Access Complaint on March 24, 2010.

because such notes are not the official record of the meeting, the requested records are exempt from disclosure as advisory, consultative or deliberative material pursuant to N.J.S.A. 47:1A-1.1 and O’Shea v. West Milford Board of Education, GRC Complaint No. 2004-93 (April 2006). *See also* Lucente v. City of Union City (Hudson), GRC Complaint No. 2008-119 (November 2009). Accordingly, the Custodian has not unlawfully denied access to the requested records. N.J.S.A. 47:1A-6.

3. Although the Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. by failing to respond to the OPRA request in writing within the statutorily mandated seven (7) business days, the Custodian lawfully denied access to the requested records because they are exempt from disclosure as advisory, consultative or deliberative material pursuant to N.J.S.A. 47:1A-1.1 and O’Shea v. West Milford Board of Education, GRC Complaint No. 2004-93 (April 2006). 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. Accordingly, the Custodian’s conduct does not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

### **February 7, 2011**

Council’s Interim Order distributed to the parties.

### **February 22, 2011**

Custodian’s letter to the GRC requesting reconsideration of the Council’s January 25, 2011 decision. The Custodian contests the Council’s finding that he failed to respond to the Complainant’s OPRA request within the statutorily mandated seven (7) business days. The Custodian certifies that he received the Complainant’s OPRA request on February 4, 2010. The Custodian certifies that on February 15, 2010, the Sparta Township School District was closed due to the state’s observance of Presidents’ Day. The Custodian certifies that he responded to the Complainant’s request on February 16, 2010. The Custodian certifies that February 16, 2010 was the seventh (7<sup>th</sup>) business day, and has accordingly complied with OPRA.

### **February 22, 2011**

Custodian Counsel’s letter to the GRC attaching a copy of a Sparta School District Calendar for school year 2009-2010. Counsel argues that because the GRC failed to include a non-business day in its calculation of the statutorily prescribed deadline, the decision is based upon "palpably incorrect or irrational basis" and "did not consider the significance of probative, competent evidence." Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996).

Counsel states that the GRC may reconsider any decision it renders at its discretion pursuant to *N.J.A.C. 5:105-2.10* and that a party may seek reconsideration by

filing a written request within ten (10) business days following receipt of a decision and serving the request on all parties. *N.J.A.C.* 5:105-2.10(b) and (c). Counsel maintains that the moving party must establish that the GRC's decision is based upon a "palpably incorrect or irrational basis" or when "it is obvious that the GRC did not consider the significance of probative, competent evidence." *Ashton v. Maurice River Twp.*, GRC Complaint No. 2008-159 (December 2009), citing *Cummings, supra*, 295 *N.J. Super.* 374.

Counsel asserts that the Board's motion for reconsideration complies with the time frame for filing such a motion required by *N.J.A.C.* 5:105-2.10(b) ("requests for reconsideration must be filed within ten (10) business days following receipt of a Council decision"). The Board received the final decision in this matter on February 11, 2011. Because Monday, February 21, 2011 was a non-business day, specifically Presidents' Day pursuant to *N.J.S.A.* 11A:6-24.1(a)(3), the tenth (10<sup>th</sup>) day following the Board's receipt of the final decision is February 22, 2011. The Custodian maintains that the Board's motion for reconsideration of the GRC's decision must be considered timely filed.

### Analysis

#### **Whether the Complainant has met the required standard for reconsideration of the Council's January 25, 2011 Final Decision?**

Pursuant to *N.J.A.C.* 5:105-2.10, parties may file a request for a reconsideration of any decision rendered by the Council within ten (10) business days following receipt of a Council decision. Requests must be in writing, delivered to the Council and served on all parties. Parties must file any objection to the request for reconsideration within ten (10) business days following receipt of the request. The Council will provide all parties with written notification of its determination regarding the request for reconsideration. *N.J.A.C.* 5:105-2.10(a) – (e).

In the matter before the Council, the Complainant filed the request for reconsideration of the Council's Order dated January 25, 2011, on February 22, 2011, nine (9) business days after receiving the Council's decision on February 9, 2011. Pursuant to *N.J.A.C.* 5:105-2.10(a), the Council may, on its own discretion, reconsider any decision it renders. Thus, the Council will consider the Complainant's request for reconsideration of this matter and Custodian Counsel's opposition thereto as timely filed pursuant to *N.J.A.C.* 5:105-2.10(a) and (b).

Applicable case law holds that:

“[a] party should not seek reconsideration merely based upon dissatisfaction with a decision.” *D'Atria v. D'Atria*, 242 *N.J. Super.* 392, 401 (Ch. Div. 1990). Rather, reconsideration is reserved for those cases where (1) the decision is based upon a "palpably incorrect or irrational basis;" or (2) it is obvious that the finder of fact did not consider, or failed to appreciate, the significance of probative, competent evidence. *E.g.*,

Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996). The moving party must show that the court acted in an arbitrary, capricious or unreasonable manner. D'Atria, supra, 242 N.J. Super. at 401. 'Although it is an overstatement to say that a decision is not arbitrary, capricious, or unreasonable whenever a court can review the reasons stated for the decision without a loud guffaw or involuntary gasp, it is not much of an overstatement.' *Ibid.*" In The Matter Of The Petition Of Comcast Cablevision Of South Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Television System In The City Of Atlantic City, County Of Atlantic, State Of New Jersey, 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

In support of his motion for reconsideration, the Custodian argues that the Council's finding that he failed to respond to the Complainant's OPRA request within the statutorily mandated seven (7) business days is erroneous. The Custodian certifies that he received the Complainant's OPRA request on February 4, 2010. The Custodian certifies that on February 15, 2010, the Sparta Township School District was closed due to the state's observance of Presidents' Day. The Custodian certifies that he supplied a written response to the Complainant's request on February 16, 2010. The Custodian certifies that February 16, 2010 was the seventh (7<sup>th</sup>) business day following receipt of the Complainant's OPRA request; and accordingly the Council's finding of a "deemed denial" pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007) was rendered on a "palpably incorrect or irrational basis" and the GRC "did not consider the significance of probative, competent evidence." Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996).

Although the Custodian in this motion for reconsideration has supplied evidence to establish that he responded to the Complainant's OPRA request within the statutorily mandated seven (7) business days, the Custodian bore the burden of proving by a preponderance of the probative, competent evidence that the denial of access was authorized by law. N.J.S.A. 47:1A-6. During the initial adjudication of this complaint, the Custodian, his Counsel, and the Sparta School District failed to make any mention or present any evidence that demonstrated that the Sparta School District was closed for business on February 15, 2010. Such a fact is especially pertinent because Presidents' Day is not a holiday universally observed by every state agency and school district. Thus, the Council rejects the Custodian's contention that the Council's January 25, 2011 decision was based upon a "palpably incorrect or irrational basis" because the Custodian did not carry his statutory burden of proof.

Nevertheless, the Council will exercise its discretion to reconsider its decision dated January 25, 2011 pursuant to N.J.A.C. 5:105-2.10. Having now provided the Council with a copy of the 2009-2010 Sparta School District Calendar as evidence that the Sparta School District was closed for business on February 15, 2010, the Council hereby finds that the Custodian's response to the Complainant's February 4, 2010 OPRA request on February 16, 2010 was made on the seventh (7<sup>th</sup>) business day upon receipt of such request. Therefore, the Custodian has complied with OPRA's requirement that the Custodian either grants or denies access to requested records within seven (7) business

days from receipt of said request. N.J.S.A. 47:1A-5.i. The Council's decision dated January 25, 2011 is therefore amended to delete paragraph #1 of the Conclusions and Recommendations.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that having now supplied the Council with a copy of the 2009-2010 Sparta School District Calendar as evidence that the Sparta School District was closed for business on February 15, 2010, the Council hereby finds that the Custodian's response to the Complainant's February 4, 2010 OPRA request on February 16, 2010 was made on the seventh (7<sup>th</sup>) business day upon receipt of such request. Therefore, the Custodian has complied with OPRA's requirement that the Custodian either grants or denies access to requested records within seven (7) business days from receipt of said request. N.J.S.A. 47:1A-5.i. The Council's decision dated January 25, 2011 is therefore amended to delete paragraph #1 of the Conclusions and Recommendations.

Prepared By: Darryl Rhone  
Case Manager

Approved By: Catherine Starghill, Esq.  
Executive Director

April 20, 2011



**State of New Jersey**  
GOVERNMENT RECORDS COUNCIL  
101 SOUTH BROAD STREET  
PO BOX 819  
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CHRIS CHRISTIE  
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**FINAL DECISION**

**January 25, 2011 Government Records Council Meeting**

Michael R. Schiavoni  
Complainant

Complaint No. 2010-73

v.

Sparta Township School District (Sussex)  
Custodian of Record

At the January 25, 2011 public meeting, the Government Records Council (“Council”) considered the January 18, 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. The Complainant’s failure to provide a written response to the Complainant’s request within the statutorily mandated seven (7) business days of receipt thereof results in a “deemed” denial pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).
2. Because the requested records comprise notes used as a memory aid to facilitate comments made during a Board of Education meeting, and because such notes are not the official record of the meeting, the requested records are exempt from disclosure as advisory, consultative or deliberative material pursuant to N.J.S.A. 47:1A-1.1 and O’Shea v. West Milford Board of Education, GRC Complaint No. 2004-93 (April 2006). *See also* Lucente v. City of Union City (Hudson), GRC Complaint No. 2008-119 (November 2009). Accordingly, the Custodian has not unlawfully denied access to the requested records. N.J.S.A. 47:1A-6.
3. Although the Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. by failing to respond to the OPRA request in writing within the statutorily mandated seven (7) business days, the Custodian lawfully denied access to the requested records because they are exempt from disclosure as advisory, consultative or deliberative material pursuant to N.J.S.A. 47:1A-1.1 and O’Shea v. West Milford Board of Education, GRC Complaint No. 2004-93 (April 2006). 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. Accordingly, the Custodian’s conduct does not rise to the





level of a knowing and willful violation of OPRA and 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 25<sup>th</sup> Day of January, 2011

Robin Berg Tabakin, Chair  
Government Records Council

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

Charles A. Richman, Secretary  
Government Records Council

**Decision Distribution Date: February 7, 2011**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
January 25, 2011 Council Meeting**

**Michael R. Schiavoni<sup>1</sup>**  
**Complainant**

**GRC Complaint No. 2010-73**

v.

**Sparta Township School District (Sussex)<sup>2</sup>**  
**Custodian of Records**

**Records Relevant to Complaint:** Copies of documents to which Sparta Township Board of Education (“BOE”) member, Mr. Kevin Pollison, referred in his comments at the January 25, 2010 Board of Education meeting regarding Sparta Township School District performance on New Jersey standardized tests versus other New Jersey school districts.

**Request Made:** February 4, 2010

**Response Made:** February 16, 2010

**Custodian:** Dr. Warren S. Ceurvels

**GRC Complaint Filed:** March 19, 2010<sup>3</sup>

**Background**

**February 4, 2010**

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.

**February 16, 2010**

Custodian’s response to the OPRA request. The Custodian responds in writing to the Complainant’s OPRA request on the eighth (8<sup>th</sup>) business day following receipt of such request. The Custodian states that access to the requested records are denied because in accordance with O’Shea v. West Milford Board of Education, 391 N.J. Super 534 (App. Div. 2007), the requested records are not government records as defined by OPRA. The Custodian states that the records represent a memory aid used by the BOE member in making a statement to the public at the January 25, 2010 Board meeting. The Custodian maintains that the BOE member’s statement to the public is accurately reflected in the formal minutes of the meeting, which remain available to the requester for review and/or reproduction.

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

<sup>2</sup> Represented by Rodney T. Hara, Esq., Fogarty & Hara (Fair Lawn, NJ).

<sup>3</sup> The GRC received the Denial of Access Complaint on March 24, 2010.

### **March 19, 2010**

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

- Copy of the Sparta Township BOE meeting minutes dated January 25, 2010
- Complainant’s OPRA request dated February 4, 2010
- Copy of Letter to the Editor, Sparta Independent, from the Complainant dated February 11, 2010
- Letter from the Custodian to the Complainant dated February 16, 2010<sup>4</sup>

The Complainant states that he attended the Sparta Township BOE meeting on January 25, 2010 (“BOE meeting”) and that he was able to see that BOE member Kevin Pollison was referring to notes during his comments regarding Sparta Township School District test scores. The Complainant asserts that during the first public comment period at the BOE meeting, he offered his assessment of Sparta Township School District performance on New Jersey standardized test scores versus other “I” school district schools. The Complainant maintains that after public participation in the meeting was complete, Mr. Pollison offered comments regarding Sparta test scores. The Complainant alleges that Mr. Pollison used the requested notes to make comments on standard test scores of Sparta Township schools in comparison to other New Jersey “I” school districts.

The Complainant argues that Mr. Pollison’s conclusions concerning the test scores were radically different from the analysis the Complainant had presented on Sparta performance on New Jersey standard test scores versus other “I” Districts. The Complainant states that he attempted to understand the huge difference in Mr. Pollison’s analysis compared to his own by requesting Mr. Pollison’s notes. The Complainant argues that said notes became public records when Mr. Pollison referred to them when he made comments at the BOE meeting. The Complainant asserts that he made an OPRA request for the requested documents on February 4, 2010.

The Complainant states that on February 16, 2010 he received a written response to the OPRA request from Dr. Warren Ceurvets, Sparta Township BOE Secretary, denying the OPRA request. The Complainant asserts that the instant case is entirely different from the O’Shea case cited by the Custodian in his denial of access. The Complainant argues that he cannot ascertain if the BOE minutes are accurate if he cannot review Mr. Pollison’s notes. The Complainant states that the BOE minutes are only a brief summary of Mr. Pollison’s remarks and not a complete recapitulation of his comments. The Complainant maintains that in order to analyze how there can be a huge discrepancy between his and Mr. Pollison’s findings, the Complainant needs to review all of Mr. Pollison’s notes used at the BOE meeting.

The Complainant states that there have been several occasions over the past three (3) years when he was a member of the Sparta Township BOE that the BOE minutes have contained significant inaccuracies. The Complainant maintains that the Sparta Township BOE stopped making audio tapes of the BOE meetings in January 2010 so there is no way to review Mr. Pollison’s complete comments. In addition, the Complainant states that he has

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<sup>4</sup> Additional documentation not relevant to the adjudication of the complaint was attached.

met resistance from the Custodian who has denied the Complainant's previous OPRA requests.<sup>5</sup> The Complainant argues that the failure of the Sparta Township BOE Secretary to provide BOE member notes used in public comments violates OPRA.

The Complainant agrees to mediate this complaint.

**April 19, 2010**

Offer of Mediation sent to the Custodian.

**April 27, 2010**

The Custodian declines mediation.

**April 27, 2010**

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

**May 4, 2010<sup>6</sup>**

Custodian's SOI attaching the Complainant's February 4, 2010 OPRA request.

The Custodian certifies that no records responsive have been destroyed.

The Custodian certifies that the Complainant's OPRA request seeking records which BOE member Kevin Pollison referred to in making comments on Sparta Township School District performance on New Jersey standardized tests at the BOE meeting on January 25, 2010 was received on February 4, 2010. The Custodian also certifies that he immediately reviewed the Complainant's OPRA request and gathered all responsive documents that were in the Sparta Township BOE's and the individual BOE member's possession.

The Custodian further certifies that he responded to said request in writing on February 16, 2010, denying access to the requested records pursuant to O'Shea v. West Milford Bd. of Educ., 391 N.J.Super. 534 (App. Div. 2007), under which the requested records are not government record as defined in OPRA and stating that the requested records represent memory aids used by the BOE member to assist him in making a statement to the public at the BOE meeting on January 25, 2010, and further stating that the BOE member's statement to the public is accurately reflected in the formal minutes of the meeting which are available to the Complainant for review and/or reproduction.

The Custodian also certifies that the Complainant filed a Denial of Access Complaint with the GRC on February 27, 2009 and served a copy on the BOE.

The Custodian states that in the Denial of Access Complaint, the Complainant provided additional clarification regarding the records sought and stated that the BOE member's public statement regarding the breakdown of relevant test scores was inconsistent with the Complainant's personal analysis of this information.

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<sup>5</sup> Said requests are not the subject of the instant Denial of Access Complaint.

<sup>6</sup> The parties subsequently submitted additional materials which are not relevant to the adjudication of this Denial of Access Complaint.

The Custodian argues that the Complainant does not provide any basis upon which to conclude that the personal notes in question represent an accessible government record; instead, the Complainant contends that the notes Pollison allegedly referred to in making his public statements must be disclosed in order to: (1) explain the alleged discrepancy between Mr. Pollison's and his own analysis, and (2) allow Complainant to ascertain whether or not the official BOE minutes memorializing Mr. Pollison's statement are accurate. The Custodian states that the Complainant's claim is entirely without merit and must be rejected by the Government Records Council. The Custodian maintains that the BOE appropriately denied Complainant's OPRA request based upon its conclusion that the requested notes were Mr. Pollison's personal memory aid and not a government record as defined in OPRA.

The Custodian states that the BOE's position is thoroughly supported by O'Shea v. West Milford Bd. of Educ., 391 N.J. Super. 534, 538 (App Div. 2007), where the Appellate Division determined that a board secretary's informal handwritten notes taken preliminary for the secretary preparing a draft of minutes for the board's consideration and approval were not "government records" as defined by OPRA. The Custodian argues that O'Shea is particularly relevant to the instant matter because the court specifically rejected the complainant's contention that the secretary's handwritten notes, jotted down as a memory aide to assist in preparing the formal minutes, were a public record merely because they were "made" by a public official. The Custodian notes that the O'Shea court astutely noted that under such rationale, "every yellow sticky note penned by a government official to help him or her remember a work related task would be a public record" and that "[s]uch absurd results were not contemplated or required by OPRA." *Id.* at 538-9.

The Custodian asserts that applying this rationale to the instant facts, it is clear that any personal notes that Mr. Pollison may have used solely as an informal memory aid to assist him in making a statement to the public are not a "government record" as defined by OPRA. The Custodian argues that, as was the case in O'Shea, it is the formal Board minutes that memorialize Mr. Pollison's statements and not Mr. Pollison's actual public statement nor his personal memory aid, which represent the public record available for public access. *Id.* at 538.

The Custodian argues that the GRC has consistently determined that personal notes intended to serve as informal memory aids for a public entity/official are typically exempt from disclosure as advisory, consultative or deliberative material pursuant to N.J.S.A., 47:A1-1.1. The Custodian states that in Lucente v. City of Union City Custodian of Record, GRC Complaint No. 2008-119 (November 2009), the GRC determined that the custodian lawfully redacted or withheld from disclosure the handwritten notes contained in complainant's personnel records on this basis.

The Custodian further states that in Hardwick v. New Jersey Department of Transportation, GRC Complaint No. 2007-164 (February 2008), the GRC determined that the personal notes of the attendees of staff meetings were informal memory aids and thus exempt from disclosure as advisory, consultative or deliberative materials pursuant to N.J.S.A. 47:A1-1.1 and O'Shea, *supra*. The Custodian asserts that in Hardwick, *supra*, the GRC placed great weight upon the O'Shea court's distinction of Gannet New Jersey Partners LLP v. County of Middlesex, 379 N.J. Super. 205 (App. Div. 2005), where it was determined that the county improperly refused to release the certain handwritten notes of a principal planner

in the County Planning Department. The Custodian also asserts that the court in O'Shea specifically distinguished the facts of Gannett, noting that, "[i]n Gannett, it appeared that the notes were made part of the planner's investigation of the application. The Custodian argues that there is no indication that the notes have been translated into some more formal form, such as an official report, nor were they the kind of informal memory aide at issue here. The Custodian argues that this distinction, which the GRC found applicable to its determination in Hardwick, is similarly apposite to the case at hand; as Mr. Pollison's public comments, to the extent drawn from his personal notes, were translated into formal minutes of the meeting available for Complainant's review.

The Custodian asserts that his actions are further supported by the GRC's decision in O'Shea, wherein the GRC concluded following an *in camera* review that the board secretary's notes were clearly intended to serve as a memory aid, and without further explanation from the board secretary could not be relied upon as a factual account of the board proceedings as in O' Shea v. West Milford Bd. of Educ., GRC Complaint No. 2004-93 (November 2005). Therefore, the Custodian argues that the GRC determined that the statutory exemption for advisory, consultative and deliberative material applied, or alternatively that the notes represented work in progress that could not be appropriately characterized as a government record under OPRA. *Id.* The Custodian maintains that the GRC, therefore, concluded that the requestor, who was provided with both the approved and unapproved draft minutes, had "no discernible interest in obtaining the handwritten notes such that it would be appropriate to override the statutory exemption" and affirmed the custodian's denial. *Id.* Although the appellate court in O'Shea ultimately went a step further and concluded that the handwritten notes were not government records at all, it also agreed with the GRC that the handwritten notes could be considered intra-agency consultative materials exempt from disclosure. *Id.* at 538.

The Custodian argues that in the instant matter, Mr. Pollison's personal notes were used as a memory aid to assist him in making a statement to the public at the January 25, 2010 BOE meeting and cannot be relied upon as a factual account of the meeting's proceedings. The Custodian asserts that any information that Mr. Pollison verbally conveyed to the public at that meeting was incorporated into the formal minutes of the meeting which the Custodian specifically advised were available to the Complainant for review and/or reproduction. The Custodian argues that it is undisputed that Complainant was provided with a copy of the Board minutes reflecting Mr. Pollison's actual statements to the public regarding his analysis of the relevant test scores. The Custodian states that when applying the analysis utilized by the GRC in Hardwick, Lucente, and O'Shea, *supra*, the Custodian's denial of the Complainant's request, specifically Mr. Pollison's personal notes, is proper. The Custodian maintains that the notes were used as an informal memory aid and is not a government record as defined by OPRA, and is also exempt from disclosure as advisory, consultative or deliberative material pursuant to N.J.S.A. 47:A-1.1.

The Custodian maintains that the Complainant's disagreement with the accuracy of a BOE member's public statement does not transform Mr. Pollison's statements into a public record that would be available under OPRA. The Custodian maintains that the Complainant's additional allegations regarding the Custodian's response to previous OPRA requests submitted by Complainant are not the subject of this complaint and therefore have no bearing on its outcome.

## 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 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 matter before the Council, the Complainant submitted an OPRA request on February 4, 2010. The Custodian responded in writing on February 16, 2010, the eighth (8<sup>th</sup>) business day following receipt thereof, denying access to the requested records.

OPRA mandates that a custodian must either grant or deny access to requested records within seven (7) business days from receipt of said request. N.J.S.A. 47:1A-5.i. As also prescribed under N.J.S.A. 47:1A-5.i., a custodian’s failure to respond within the required seven (7) business days results in a “deemed” denial. Further, a custodian’s response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5.g.<sup>7</sup> Thus, a custodian’s failure to respond in writing to a complainant’s OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).

Here, the Custodian did not provide a written response to the Complainant’s OPRA request within the statutorily mandated seven (7) business days of receipt thereof. Accordingly, the Complainant’s failure to provide a written response to the Complainant’s

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<sup>7</sup> It is the GRC’s position that a custodian’s written response either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, even if said response is not on the agency’s official OPRA request form, is a valid response pursuant to OPRA. Michael Schiavoni v. Sparta Township School District (Sussex), 2010-73 – Findings and Recommendations of the Executive Director

request within the statutorily mandated seven (7) business days of receipt thereof results in a “deemed” denial pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley, supra.

**Whether the Custodian lawfully denied access to the requested notes as advisory, consultative and deliberative (“ACD”) material?**

The Custodian argues that the GRC has consistently determined that personal notes intended to serve as informal memory aids for a public official are typically exempt from disclosure under OPRA as ACD material pursuant to N.J.S.A. 47:1A-1.1, and accordingly all materials used by Mr. Pollison during the Board meeting fall under this exemption.

OPRA excludes from the definition of a government record “inter-agency or intra-agency advisory, consultative or deliberative material.” N.J.S.A. 47:1A-1.1. It is evident that this phrase is intended to exclude from the definition of a government record the types of documents that are the subject of the “deliberative process privilege.”

In O’Shea v. West Milford Board of Education, GRC Complaint No. 2004-93 (April 2006),<sup>8</sup> the complainant requested handwritten notes taken by the school board secretary during a Board of Education meeting. The Council concluded that the Board Secretary’s handwritten notes taken during the June 22, 2004 executive session meeting are exempt from disclosure under the “inter-agency, intra-agency advisory, consultative, or deliberative” privilege pursuant to N.J.S.A. 47:1A-1.1.

In doing so, the Council stated that “neither the statute nor the courts have defined the terms... ‘advisory, consultative, or deliberative’ in the context of the public records law. The Council looks to an analogous concept, the deliberative process privilege, for guidance in the implementation of OPRA’s ACD exemption. Both the ACD exemption and the deliberative process privilege enable a governmental entity to shield from disclosure material that is pre-decisional and deliberative in nature. Deliberative material contains opinions, recommendations, or advice about agency policies. In Re the Liquidation of Integrity Insurance Company, 165 N.J. 75, 88 (2000); In Re Readoption with Amendments of Death Penalty Regulations, 182 N.J.149 (App. Div. 2004).

Moreover, in Lucente v. City of Union City (Hudson), GRC Complaint No. 2008-119 (November 2009), the complainant sought personnel records regarding his employment with the public agency. The Council determined that the Custodian lawfully redacted or withheld from disclosure certain handwritten notes contained on the Complainant’s personnel records because said notes were informal memory aids and were exempt from disclosure as advisory, consultative or deliberative material pursuant to N.J.S.A. 47:1A-1.1 and O’Shea v. West Milford Board of Education, 391 N.J. Super. 534, 538 (App. Div. 2007); *cert. denied* 192 N.J. 292 (2007).

The deliberative process privilege is a doctrine that permits government agencies to withhold documents that reflect advisory opinions, recommendations and deliberations submitted as part of a process by which governmental decisions and policies are formulated.

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<sup>8</sup> Appealed at O’Shea v. West Milford Board of Education, 391 N.J. Super. 534, 538 (App. Div. 2007); *cert. denied* 192 N.J. 292 (2007).



NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 150, 95 S. Ct. 1504, 1516, 44 L. Ed. 2d 29, 47 (1975). Specifically, the New Jersey Supreme Court has ruled that a record that contains or involves factual components is entitled to deliberative-process protection under the exemption in OPRA when it was used in decision-making process *and* its disclosure would reveal deliberations that occurred during that process. Education Law Center v. NJ Department of Education, 198 N.J. 274, 966 A.2d 1054, 1069 (2009). This long-recognized privilege is rooted in the concept that the sovereign has an interest in protecting the integrity of its deliberations. The earliest federal case adopting the privilege is Kaiser Alum. & Chem. Corp. v. United States, 157 F. Supp. 939 (1958). The privilege and its rationale were subsequently adopted by the federal district courts and circuit courts of appeal. United States v. Farley, 11 F.3d 1385, 1389 (7th Cir.1993).

The deliberative process privilege was discussed at length in In Re Liquidation of Integrity Insurance Co., 165 N.J. 75 (2000). There, the court addressed the question of whether the Commissioner of Insurance, acting in the capacity of Liquidator of a regulated entity, could protect certain records from disclosure which she claimed contained opinions, recommendations or advice regarding agency policy. *Id.* at 81. The court adopted a qualified deliberative process privilege based upon the holding of McClain v. College Hospital, 99 N.J. 346 (1985), Liquidation of Integrity, *supra*, 165 N.J. at 88. In doing so, the court noted that:

“[a] document must meet two requirements for the deliberative process privilege to apply. First, it must have been generated before the adoption of an agency's policy or decision. In other words, it must be pre-decisional. ... Second, the document must be deliberative in nature, containing opinions, recommendations, or advice about agency policies. ... Purely factual material that does not reflect deliberative processes is not protected. ... Once the government demonstrates that the subject materials meet those threshold requirements, the privilege comes into play. In such circumstances, the government's interest in candor is the "preponderating policy" and, prior to considering specific questions of application, the balance is said to have been struck in favor of non-disclosure.” (Citations omitted.) *Id.* at 84-85.

The court further set out procedural guidelines based upon those discussed in McClain:

“[t]he initial burden falls on the state agency to show that the documents it seeks to shield are pre-decisional and deliberative in nature (containing opinions, recommendations, or advice about agency policies). Once the deliberative nature of the documents is established, there is a presumption against disclosure. The burden then falls on the party seeking discovery to show that his or her compelling or substantial need for the materials overrides the government's interest in non-disclosure. Among the considerations are the importance of the evidence to the movant, its availability from other sources, and the effect of disclosure on frank and independent discussion of contemplated government policies.” In Re

Liquidation of Integrity, *supra*, 165 N.J. at 88, citing McClain, *supra*, 99 N.J. at 361-62, 492 A.2d 991.

In In Re Liquidation of Integrity, *supra*, 165 N.J. at 84-5, the judiciary set forth the legal standard for applying the deliberative process privilege as follows:

- (1) The initial burden falls on the government agency to establish that matters are both *pre-decisional* and *deliberative*.
  - a. Pre-decisional means that the records were generated before an agency adopted or reached its decision or policy.
  - b. Deliberative means that the record contains opinions, recommendations, or advice about agency policies or decisions.
    - i. Deliberative materials do not include purely factual materials.
    - ii. Where factual information is contained in a record that is deliberative, such information must be produced so long as the factual material can be separated from its deliberative context.
  - c. The exemption covers recommendations, draft documents, proposals, suggestions, and other subjective documents *which reflect the personal opinions of the writer rather than the policy of the agency*.
  - d. Documents which are protected by the privilege are those which *would inaccurately reflect or prematurely disclose the views of the agency, suggesting as agency position that which is only a personal position*.
  - e. To test whether disclosure of a document is likely to adversely affect the purposes of the privilege, courts ask themselves *whether the document is so candid or personal in nature that public disclosure is likely in the future to stifle honest and frank communications within the agency*.

In the instant case, GRC and New Jersey Superior Court's holdings maintaining the lawful exemption of handwritten notes as ACD material are dispositive. Here, the requested records are comprised of notes used by BOE member, Mr. Pollison, in making comments during the BOE meeting. The notes sought by the Complainant are not the official record of the meeting, but were used as an informal memory aid by Mr. Pollison at the time he made his comments. To the contrary, the meeting minutes of the BOE meeting constitute the official record of the BOE meeting. See N.J.S.A. 10:4-14.

Therefore, because the requested records comprise notes used as a memory aid to facilitate comments made during a BOE meeting, and because such notes are not the official record of the meeting, the requested records are exempt from disclosure as advisory, consultative or deliberative material pursuant to N.J.S.A. 47:1A-1.1, Lucente and O'Shea, *supra*. Accordingly, the Custodian has not unlawfully denied access to the requested records. N.J.S.A. 47:1A-6.

**Whether the Custodian’s untimely deemed denial of access to the requested record 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-11a.

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, 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).

Although the Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. by failing to respond to the OPRA request in writing within the statutorily mandated seven (7) business days, the Custodian lawfully denied access to the requested records because they are exempt from disclosure as advisory, consultative or deliberative material pursuant to N.J.S.A. 47:1A-1.1 and O’Shea, supra. 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. Accordingly, the Custodian’s conduct does not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

**Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. The Complainant’s failure to provide a written response to the Complainant’s request within the statutorily mandated seven (7) business days of receipt thereof results in a “deemed” denial pursuant to N.J.S.A.

47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).

2. Because the requested records comprise notes used as a memory aid to facilitate comments made during a Board of Education meeting, and because such notes are not the official record of the meeting, the requested records are exempt from disclosure as advisory, consultative or deliberative material pursuant to N.J.S.A. 47:1A-1.1 and O’Shea v. West Milford Board of Education, GRC Complaint No. 2004-93 (April 2006). *See also* Lucente v. City of Union City (Hudson), GRC Complaint No. 2008-119 (November 2009). Accordingly, the Custodian has not unlawfully denied access to the requested records. N.J.S.A. 47:1A-6.
3. Although the Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. by failing to respond to the OPRA request in writing within the statutorily mandated seven (7) business days, the Custodian lawfully denied access to the requested records because they are exempt from disclosure as advisory, consultative or deliberative material pursuant to N.J.S.A. 47:1A-1.1 and O’Shea v. West Milford Board of Education, GRC Complaint No. 2004-93 (April 2006). 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. Accordingly, the Custodian’s conduct does not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

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January 18, 2010