



**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*

**RICHARD E. CONSTABLE, III**  
*Commissioner*

**FINAL DECISION**

**November 19, 2013 Government Records Council Meeting**

Robert Nevitt (WTEA President)  
Complainant

Complaint Nos. 2012-318 and 2012-325

v.

Winslow Township School District  
Custodian of Record

At the November 19, 2013 public meeting, the Government Records Council (“Council”) considered the November 12, 2013 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. Although the Custodian complied with the Council’s September 24, 2013 Interim Order by disclosing a copy of the requested record to the Complainant, the Custodian did not do so until the fourteenth (14<sup>th</sup>) day following receipt of said Order. As such, the Custodian failed to fully comply with the terms of the Council’s Order because the Custodian failed to comply with the Order in a timely manner.
2. The Custodian did not bear her burden of proof that she timely responded to three of the Complainant’s OPRA requests, resulting in a “deemed” denial of those requests. N.J.S.A. 47:1A-5(g) and 5(i) and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007). Furthermore, the Custodian’s November 6, 2012 response was legally insufficient and the Custodian unlawfully withheld from disclosure an audio tape of the executive session minutes for October 24, 2012. Moreover, the Custodian did not comply in a timely manner with the Council’s September 24, 2013 Interim Order. However, the Custodian did disclose the requested record pursuant to the terms of the Council’s Order. Additionally, the evidence of record does not indicate that the Custodian’s actions had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian’s actions did 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 19<sup>th</sup> Day of November, 2013

Robin Berg Tabakin, Esq., Chair  
Government Records Council

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

Steven Ritardi, Esq., Secretary  
Government Records Council

**Decision Distribution Date: November 21, 2013**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director  
November 19, 2013 Council Meeting**

**Robert Nevitt (WTEA President)<sup>1</sup>  
Complainant**

**GRC Complaint No. 2012-318  
GRC Complaint No. 2012-325  
(Consolidated)**

v.

**Winslow Township School District<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:**

Request dated October 25, 2012: A copy of all evidence presented during executive session by the Superintendent resulting in the Board's decision to withhold the increment of Suzanne Diaz. If the evidence was redacted, this request is for the redacted evidence. If the evidence was not redacted, the evidence requested is for exactly what was presented to the Board members.

Request dated November 15, 2012: A copy of all evidence presented during executive session by the Superintendent resulting in the Board's decision to withhold the increment of Suzanne Diaz. If the evidence was redacted, this request is for the redacted evidence. If the evidence was not redacted, the evidence requested is for exactly what was presented to the Board members.

Request dated November 15, 2012: Written copy of the executive session minutes for October 24, 2012 in full or redacted form. Audio copy of the executive session minutes for October 24, 2012 in full or redacted form.

Request dated November 29, 2012: Written copy of redacted transcript of executive session for October 24, 2012.

**Custodian of Records:** Tyra McCoy-Boyle

**Requests Received by Custodian:**

The October 25, 2012 request was received on October 25, 2012.

The November 15, 2012 request was received on November 15, 2012.

The November 15, 2012 request was received on November 15, 2012.

The November 29, 2012 request was received on November 30, 2012.

**Responses Made by Custodian:**

A November 6, 2012 response was made to the October 25, 2012 request.

A November 28, 2012 response was made to the November 15, 2012 request.

A November 28, 2012 response was made to the November 15, 2012 request.

A December 11, 2012 response was made to the November 29, 2012 request.

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

<sup>2</sup> Represented by Audra Pondish, Esq., of Wade, Long, Wood & Kennedy, LLC (Laurel Springs, NJ).

Robert Nevitt v. Winslow Township School District (Camden), 2012-318 and 2012-325 – Supplemental Findings and Recommendations of the Executive Director

**GRC Complaint No. 2012-318 Received:** December 5, 2012  
**GRC Complaint No. 2012-325 Received:** December 21, 2012

### **Background**<sup>3</sup>

At its September 24, 2013 public meeting, the Government Records Council (“Council”) considered the September 17, 2013 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. The Custodian’s November 6, 2012 response was legally insufficient because the Custodian failed to indicate the specific basis for denial of access. N.J.S.A. 47:1A-5(g).
2. The Custodian did not bear her burden of proof that she timely responded to the Complainant’s October 25, 2012 request, and two (2) November 15, 2012 OPRA requests. N.J.S.A. 47:1A-6. As such, the Custodian’s failure to respond in writing to the Complainant’s OPRA requests either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the Complainant’s OPRA requests pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).
3. The Custodian shall obtain an estimate of the actual cost of duplicating the requested audio tape of the executive session minutes for October 24, 2012, in redacted form from an outside vendor capable of performing the service and provide same to the Complainant prior to incurring the cost of redacting and duplicating the tape because the Custodian certified that the Board is otherwise unable to redact the record. N.J.S.A. 47:1A-5.b. *See also* O’Shea v. Pine Hill Board of Education (Camden), GRC Complaint No. 2007-192 (February 2009).
4. **The Custodian shall obtain the estimate in accordance with paragraph 3 above and shall make the amount available to the Complainant within five (5) business days from receipt of the Council’s Interim Order. The Custodian shall disclose to the Complainant a copy of the redacted audio tape together with a detailed document index explaining the lawful basis for each redaction upon the Complainant’s payment of the vendor charges and within ten (10) business days from receipt of the Council’s Interim Order simultaneously provide certified confirmation of compliance in accordance with N.J. Court Rule 1:4-4, to the Executive Director. If the Complainant fails to pay the charges by the tenth (10<sup>th</sup>) business day from receipt of the Council’s Interim Order, the Custodian shall provide a certification to that effect in accordance with N.J. Court Rule 1:4-4 to the Executive Director.**

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<sup>3</sup> The parties may have submitted additional correspondence or made additional statements/assertions in the submissions identified herein. However, the Council includes in the Findings and Recommendations of the Executive Director the submissions necessary and relevant for the adjudication of this complaint.  
Robert Nevitt v. Winslow Township School District (Camden), 2012-318 and 2012-325 – Supplemental Findings and Recommendations of the Executive Director

5. It is unnecessary for the Council to consider whether the Custodian unlawfully denied access to any other requested records because on July 21, 2013, the Complainant notified the GRC that he was provided with the records he requested except for the aforementioned copy of the audio tape.
6. The Custodian did not unlawfully deny access to the requested minutes based solely upon the sufficiency of the disclosed record's content. *See* Kwanzaa v. Department of Corrections, GRC Complaint No. 2004-167 (March 2005), citing N.J.S.A. 47:1A-7(b). *See also* Molnar (on behalf of Express-Times) v. Warren County Community College, GRC Complaint No. 2012-04 (Interim Order April 2013).
7. 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.

#### Procedural History:

On September 25, 2013, the Council distributed its September 24, 2013 Interim Order to all parties. On October 22, 2013, the fifteenth (15<sup>th</sup>) business day following receipt of the Council's Interim Order, the Custodian forwarded a certification of compliance to the GRC.<sup>4</sup>

### Analysis

#### Compliance

On September 24, 2013, the Council ordered the above-referenced compliance. On September 25, 2013, the Council distributed its Interim Order to all parties, providing the Custodian five (5) business days from receipt of the Order to obtain an estimate of the actual cost of duplicating the requested audio tape of the October 24, 2012 executive session minutes in redacted form from an outside vendor capable of performing the service. The Order further provided that if the Complainant pays the vendor charges, then within ten (10) business days from receipt of said Order the Custodian must disclose to the Complainant a copy of the redacted audio tape together with a detailed document index explaining the lawful basis for each redaction and simultaneously provide certified confirmation of compliance to the Executive Director. Conversely, if the Complainant failed to pay the charges by the tenth (10<sup>th</sup>) business day from receipt of the Order the Custodian was required to provide a certification to that effect to the Executive Director. Therefore, the Custodian was required to provide the GRC with a certification setting forth the action taken in compliance with the Order no later than October 15, 2013, which was the tenth (10<sup>th</sup>) business day from receipt of the Council's Order.

On October 22, 2013, the fifteenth (15<sup>th</sup>) business day following receipt of the Order, the Custodian forwarded a certification of compliance to the GRC which stated that the Complainant was provided with an estimate of the actual cost of duplicating the requested record on October 4, 2013, which was the fourth (4<sup>th</sup>) business day following the Custodian's receipt of the Order.

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<sup>4</sup> The Custodian certified that she received the Council's Interim Order on September 30, 2013.

Robert Nevitt v. Winslow Township School District (Camden), 2012-318 and 2012-325 – Supplemental Findings and Recommendations of the Executive Director

The Custodian further certified that two (2) business days later, on October 8, 2013, the Complainant informed the Custodian that he was willing to purchase the record. The Custodian certified that four (4) business days later, on October 15, 2013, she retained the services of an outside vendor to duplicate and redact the requested record. The Custodian certified the record was ready the following day, and was delivered to the Complainant on October 21, 2013, when the Complainant paid the vendor charges.

Therefore, although the Custodian complied with the Council's September 24, 2013 Interim Order by disclosing a copy of the requested record to the Complainant, the Custodian did not do so until the fourteenth (14<sup>th</sup>) day following receipt of said Order. As such, the Custodian failed to fully comply with the terms of the Council's Order because the Custodian failed to comply with the Order in a timely manner.

### **Knowing & Willful**

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 “... [i]f 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)).

The Custodian did not bear her burden of proof that she timely responded to three of the Complainant's OPRA requests, resulting in a “deemed” denial. N.J.S.A. 47:1A-5(g) and 5(i). Furthermore, the Custodian's November 6, 2012 response was legally insufficient and the Custodian unlawfully withheld from disclosure an audio tape of the executive session minutes for October 24, 2012. Moreover, the Custodian did not comply in a timely manner with the Council's September 24, 2013 Interim Order. However, the Custodian did disclose the requested record pursuant to the terms of the Council's Order. Additionally, the evidence of record does not indicate that the Custodian's actions had a positive element of conscious wrongdoing or was

intentional and deliberate. Therefore, the Custodian's actions did 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. Although the Custodian complied with the Council's September 24, 2013 Interim Order by disclosing a copy of the requested record to the Complainant, the Custodian did not do so until the fourteenth (14<sup>th</sup>) day following receipt of said Order. As such, the Custodian failed to fully comply with the terms of the Council's Order because the Custodian failed to comply with the Order in a timely manner.
  
2. The Custodian did not bear her burden of proof that she timely responded to three of the Complainant's OPRA requests, resulting in a "deemed" denial of those requests. N.J.S.A. 47:1A-5(g) and 5(i) and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007). Furthermore, the Custodian's November 6, 2012 response was legally insufficient and the Custodian unlawfully withheld from disclosure an audio tape of the executive session minutes for October 24, 2012. Moreover, the Custodian did not comply in a timely manner with the Council's September 24, 2013 Interim Order. However, the Custodian did disclose the requested record pursuant to the terms of the Council's Order. Additionally, the evidence of record does not indicate that the Custodian's actions had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions did not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Prepared By: John E. Stewart, Esq.

Approved By: Brandon D. Minde, Esq.  
Executive Director

November 12, 2013



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

RICHARD E. CONSTABLE, III  
Commissioner

INTERIM ORDER

September 24, 2013 Government Records Council Meeting

Robert Nevitt (WTEA President)  
Complainant

Complaint Nos. 2012-318 and 2012-325

v.

Winslow Township School District  
Custodian of Record

At the September 24, 2013 public meeting, the Government Records Council (“Council”) considered the September 17, 2013 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’s November 6, 2012 response was legally insufficient because the Custodian failed to indicate the specific basis for denial of access. N.J.S.A. 47:1A-5(g).
2. The Custodian did not bear her burden of proof that she timely responded to the Complainant’s October 25, 2012 request, and two (2) November 15, 2012 OPRA requests. N.J.S.A. 47:1A-6. As such, the Custodian’s failure to respond in writing to the Complainant’s OPRA requests either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the Complainant’s OPRA requests pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).
3. The Custodian shall obtain an estimate of the actual cost of duplicating the requested audio tape of the executive session minutes for October 24, 2012, in redacted form from an outside vendor capable of performing the service and provide same to the Complainant prior to incurring the cost of redacting and duplicating the tape because the Custodian certified that the Board is otherwise unable to redact the record. N.J.S.A. 47:1A-5.b. See also O’Shea v. Pine Hill Board of Education (Camden), GRC Complaint No. 2007-192 (February 2009).
4. **The Custodian shall obtain the estimate in accordance with paragraph 3 above and shall make the amount available to the Complainant within five (5) business days from receipt of the Council’s Interim Order. The Custodian shall disclose to the Complainant a copy of the redacted audio tape together with a detailed document index explaining the lawful basis for each redaction upon the Complainant’s payment of the vendor charges and within ten (10) business days**





**from receipt of the Council's Interim Order simultaneously provide certified confirmation of compliance in accordance with N.J. Court Rule 1:4-4<sup>1</sup>, to the Executive Director. If the Complainant fails to pay the charges by the tenth (10<sup>th</sup>) business day from receipt of the Council's Interim Order, the Custodian shall provide a certification to that effect in accordance with N.J. Court Rule 1:4-4 to the Executive Director.**

5. It is unnecessary for the Council to consider whether the Custodian unlawfully denied access to any other requested records because on July 21, 2013, the Complainant notified the GRC that he was provided with the records he requested except for the aforementioned copy of the audio tape.
6. The Custodian did not unlawfully deny access to the requested minutes based solely upon the sufficiency of the disclosed record's content. *See* Kwanzaa v. Department of Corrections, GRC Complaint No. 2004-167 (March 2005), citing N.J.S.A. 47:1A-7(b). *See also* Molnar (on behalf of Express-Times) v. Warren County Community College, GRC Complaint No. 2012-04 (Interim Order April 2013).
7. 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 24th Day of September, 2013

Robin Berg Tabakin, Esq., Chair  
Government Records Council

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

Steven Ritardi, Esq., Secretary  
Government Records Council

**Decision Distribution Date: September 25, 2013**

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<sup>1</sup> "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
September 24, 2013 Council Meeting**

**Robert Nevitt (WTEA President)<sup>1</sup>  
Complainant**

**GRC Complaint No. 2012-318  
GRC Complaint No. 2012-325  
(Consolidated)**

v.

**Winslow Township School District<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:**

Request dated October 25, 2012: A copy of all evidence presented during executive session by the Superintendent resulting in the Board's decision to withhold the increment of Suzanne Diaz. If the evidence was redacted, this request is for the redacted evidence. If the evidence was not redacted, the evidence requested is for exactly what was presented to the Board members.

Request dated November 15, 2012: A copy of all evidence presented during executive session by the Superintendent resulting in the Board's decision to withhold the increment of Suzanne Diaz. If the evidence was redacted, this request is for the redacted evidence. If the evidence was not redacted, the evidence requested is for exactly what was presented to the Board members.

Request dated November 15, 2012: Written copy of the executive session minutes for October 24, 2012 in full or redacted form. Audio copy of the executive session minutes for October 24, 2012 in full or redacted form.

Request dated November 29, 2012: Written copy of redacted transcript of executive session for October 24, 2012.

**Custodian of Records:** Tyra McCoy-Boyle

**Requests Received by Custodian:**

The October 25, 2012 request was received on October 25, 2012.

The November 15, 2012 request was received on November 15, 2012.

The November 15, 2012 request was received on November 15, 2012.

The November 29, 2012 request was received on November 30, 2012.

**Responses Made by Custodian:**

A November 6, 2012 response was made to the October 25, 2012 request.

A November 28, 2012 response was made to the November 15, 2012 request.

A November 28, 2012 response was made to the November 15, 2012 request.

A December 11, 2012 response was made to the November 29, 2012 request.

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

<sup>2</sup> Represented by Audra Pondish, Esq., of Wade, Long, Wood & Kennedy, LLC (Laurel Springs, NJ).

Robert Nevitt v. Winslow Township School District (Camden), 2012-318 and 2012-325 – Findings and Recommendations of the Executive Director

**GRC Complaint No. 2012-318 Received:** December 5, 2012  
**GRC Complaint No. 2012-325 Received:** December 21, 2012

### **Background**<sup>3</sup>

#### **Requests and Responses:**

On October 25, 2012, the Complainant submitted an Open Public Records Act (“OPRA”) request seeking the above-listed records. On November 6, 2012, the eighth (8<sup>th</sup>) business day following receipt of said request, the Custodian responded in writing denying the request because the Custodian stated, “[n]o district documents were distributed.”

On November 15, 2012, the Complainant submitted an OPRA request seeking the above-listed records. On November 28, 2012, the eighth (8<sup>th</sup>) business day following receipt of said request, the Custodian responded in writing denying the request because the Custodian stated the records cannot be disclosed pursuant to the Family Educational Rights and Privacy Act (“FERPA”) and because information generated by or on behalf of public employees in connection with any grievance filed against an individual is exempt.

On November 15, 2012, the Complainant submitted an OPRA request seeking the above-listed records. On November 28, 2012, the eighth (8<sup>th</sup>) business day following receipt of said request, the Custodian responded in writing denying the request because the Custodian stated that the request for the audio copy of the executive session minutes contains attorney-client privileged material and material that cannot be disclosed pursuant to FERPA.

On November 29, 2012, the Complainant submitted an OPRA request seeking the above-listed records. On December 11, 2012 the seventh (7<sup>th</sup>) business day following receipt of said request, the Custodian responded in writing denying the request because the Custodian stated the requested record is nonexistent.

#### **Denial of Access Complaints:**

On December 5, 2012, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). This complaint was subsequently numbered GRC 2012-318 and the requests which formed the basis of the complaint are dated October 25, 2012 and November 15, 2012. The Complainant states that the October 25, 2012 request was denied because the Custodian asserted that no evidence was distributed.<sup>4</sup> The Complainant contends that the Custodian misinterpreted his request because he sought presented evidence. On November 15, 2012, the Complainant filed a duplicate request in which he emphasized the word “presented.” The Complainant states that the Custodian denied the request citing FERPA as a reason for denial. The Complainant contends that he made the request on behalf of WTEA

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<sup>3</sup> The parties may have submitted additional correspondence or made additional statements/assertions in the submissions identified herein. However, the Council includes in the Findings and Recommendations of the Executive Director the submissions necessary and relevant for the adjudication of this complaint.

<sup>4</sup> The evidence of record reveals the Custodian stated that no “documents” were distributed.

representing one of its members; therefore, the Custodian violated OPRA by denying the request.<sup>5</sup>

On December 21, 2012, the Complainant filed a Denial of Access Complaint with the GRC. This complaint was subsequently numbered GRC 2012-325 and the requests which formed the basis of the complaint are dated November 15, 2012 and November 29, 2012. The Complainant states that on November 15, 2012, he requested a written and audio copy of the executive session minutes for October 24, 2012, in full or redacted form. The Complainant states that he received a redacted copy of the written minutes but the audio copy of the meeting was denied pursuant to FERPA.<sup>6</sup> The Complainant states that on November 29, 2012, he requested a copy of the redacted transcript of the audio minutes of the October 24, 2012 session or a copy of the audio minutes in full or redacted form.<sup>7</sup> The Complainant states that the Custodian denied the request because the records were nonexistent. The Complainant contends that although the records may be nonexistent, all Board of Education meetings are recorded and a written transcript could have been created.

#### Statements of Information:

On January 11, 2013, the Custodian filed a Statement of Information (“SOI”) for GRC Complaint No. 2012-318. The Custodian certifies that she received the Complainant’s OPRA requests on October 25, 2012 and November 15, 2012, and that she responded to the requests on November 6, 2012 and November 28, 2012, respectively.

The Custodian certifies that the requests are overly broad because they do not contain a meeting date and do not request a specific record. The Custodian cites MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 547 (App. Div. 2005), in support of her argument. However, the Custodian certifies that notwithstanding the broad nature of the requests, she interpreted the October 25, 2012 request as seeking any documents or material provided to the Board of Education during the executive session on October 24, 2012. The Custodian asserts that since no material was distributed to the Board members during the meeting, she denied the request because no documents were available for disclosure.

The Custodian certifies that upon receipt of the November 15, 2012 request, she determined that the Complainant was seeking materials the Superintendent referred to during his presentation. The Custodian determined that the following records were therefore responsive to the request:

1. A two page student record;
2. A three page letter submitted by a student;
3. Three (3) three page student records;
4. Two (2) two page student records; and
5. A three page letter of reprimand

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<sup>5</sup> The Complainant states that WTEA stands for Winslow Township Education (sic).

<sup>6</sup> The Complainant’s November 15, 2012 request sought an audio copy of the meeting minutes.

<sup>7</sup> The Complainant’s November 29, 2012 request sought a “written copy of redacted transcript of executive session for Oct.24, 2012.”

Robert Nevitt v. Winslow Township School District (Camden), 2012-318 and 2012-325 – Findings and Recommendations of the Executive Director

The Custodian certifies that, with the exception of the letter of reprimand, which is a personnel record, all of the records responsive to the requests are protected under FERPA, which the Custodian cites as 20 U.S.C. § 1232g; 34 C.F.R. 99. The Custodian certifies that FERPA prohibits disclosure of student records to the Complainant and FERPA is applicable to OPRA under N.J.S.A. 47:1A-9(a). With respect to the letter of reprimand, the Custodian certifies that it is a personnel record exempt from disclosure pursuant to N.J.S.A. 47:1A-10. The Custodian certifies that the Complainant was properly denied access to the requested records.

On January 11, 2013, the Custodian filed a SOI for GRC Complaint No. 2012-325. The Custodian certifies that she received the Complainant's OPRA request on November 15, 2012, and November 30, 2012 and that she responded to the requests on November 28, 2012, and December 11, 2012, respectively.

The Custodian certifies that the November 15, 2012 request was denied because the material on the audio tape was exempt from disclosure as attorney-client privileged. The Custodian certifies that the Board did inquire as to whether the audio tape could be redacted, but she found that the District was unable to do so. With respect to the November 29, 2012 request, the Custodian certifies that once the requested written minutes were approved, a redacted copy was disclosed to the Complainant. The Custodian certifies that the Complainant's request for a copy of the October 24, 2012 transcript was denied because it is not required to be made, maintained or kept on file in the course of its official business; therefore, the record does not exist. The Custodian certifies that the Board is not required to create a record in response to an OPRA request.

#### Additional Information:

On January 18, 2013, the Complainant submitted a reply to the SOI for GRC Complaint No. 2012-318 and to the SOI for Complaint No. 2012-325. The Complainant states that the Custodian had the option of redacting information prohibited under FERPA which was contained in the requested records. The Complainant also states that the requested minutes he received are not reasonably comprehensive and under the law they are required to be reasonably comprehensive. The Complainant further states that as the president of WETA, he is entitled to receive certain documents on behalf of a represented WETA member pursuant to the New Jersey Employer-Employee Relations Act.

On July 21, 2013, the Complainant forwarded a letter to the GRC regarding GRC Complaint Nos. 2012-318 and 2012-325. The Complainant informed the GRC that, "I have been provided the evidence that was requested but without the 'comprehensible' minutes, the evidence that has been provided has no correlation and is fragmented." The Complainant also stated that he asked for a copy of the audio recording in full or redacted form in his OPRA request.

## Analysis<sup>8</sup>

### Sufficiency of Responses

OPRA places the burden on a custodian to prove that a denial of access to records is lawful pursuant to N.J.S.A. 47:1A-6. OPRA specifically states that a custodian “shall indicate the specific basis [for denial of access]...” N.J.S.A. 47:1A-5(g).

In this complaint, the Custodian’s November 6, 2012 response merely stated, “[n]o district documents were distributed.” As written, the Custodian’s response failed to indicate the specific basis for denial of access.

Therefore, the Custodian’s November 6, 2012 response was legally insufficient because the Custodian failed to indicate the specific basis for denial of access. N.J.S.A. 47:1A-5(g).

### Timeliness

OPRA mandates that a custodian must either grant or deny access to requested records within seven (7) business days from receipt of said request. N.J.S.A. 47:1A-5(i). A custodian’s failure to respond within the required seven (7) business days results in a “deemed” denial. *Id.* Further, a custodian’s response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5(g).<sup>9</sup> Thus, a custodian’s failure to respond in writing to a complainant’s OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).

The Custodian responded to the Complainant’s October 25, 2012 request on November 6, 2012, and the Custodian responded to the Complainant’s two (2) November 15, 2012 requests on November 28, 2012. In each case, the Custodian responded to the request on the eighth (8<sup>th</sup>) business day following receipt of it.

Therefore, the Custodian did not bear her burden of proof that she timely responded to the Complainant’s October 25, 2012 request, and two (2) November 15, 2012 OPRA requests. N.J.S.A. 47:1A-6. As such, the Custodian’s failure to respond in writing to the Complainant’s OPRA requests either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the Complainant’s OPRA requests pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley, supra.

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<sup>8</sup> There may be other OPRA issues in this matter; however, the Council’s analysis is based solely on the claims made in the Complainant’s Denial of Access Complaint.

<sup>9</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.

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## **Unlawful Denial of Access**

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.

As of July 21, 2013, the Complainant stated that he was provided with the evidence that he requested except for a copy of the audio tape of the executive session minutes for October 24, 2012, in full or redacted form. The Complainant also stated that the disclosed written minutes were not reasonably comprehensive.

With respect to the audio tape of the executive session minutes, the Custodian certified that the material on the audio tape was exempt from disclosure as attorney-client privileged, and that the Board was unable to redact it.

“...[C]opies of a government record may be purchased by any person upon payment of the fee prescribed by law or regulation, or if a fee is not prescribed by law or regulation, upon payment of the actual cost of duplicating the record. N.J.S.A. 47:1A-5(b).”

In O’Shea v. Pine Hill Bd. of Education (Camden), GRC Complaint No. 2007-192 (February 2009), the complainant requested a copy of an audio recording and charged the complainant for the duplication. The complainant objected to the fee asserting that it was excessive. However, the custodian certified that the Board of Education did not possess the capability to complete the duplication in-house and provided a cost estimate from outside vendors. The Council did not find it was unreasonable to obtain an estimate from an outside vendor for the actual cost of duplicating the record because the custodian certified that the Board lacked the equipment necessary to otherwise fulfill the complainant’s request.

Here, the Custodian shall obtain an estimate of the actual cost of duplicating the requested audio tape of the executive session minutes for October 24, 2012, in redacted form from an outside vendor capable of performing the service and provide same to the Complainant prior to incurring the cost of redacting and duplicating the tape because the Custodian certified that the Board is otherwise unable to redact the record. N.J.S.A. 47:1A-5.b. *See also* O’Shea v. Pine Hill Board of Education (Camden), GRC Complaint No. 2007-192 (February 2009).

It is unnecessary for the Council to consider whether the Custodian unlawfully denied access to any other requested records because on July 21, 2013, the Complainant notified the GRC that he was provided with the records he requested except for the aforementioned copy of the audio tape.

On July 21, 2013, the Complainant informed the GRC that, “I have been provided the evidence that was requested but without the ‘comprehensible’ minutes, the evidence that has been provided has no correlation and is fragmented.”

In Kwanzaa v. Department of Corrections, GRC Complaint No. 2004-167 (March 2005), the Complainant was dissatisfied with the record that was disclosed. The Council determined that "...[t]he document requested has been disclosed to the Complainant. Pursuant to N.J.S.A. 47:1A-7(b), *the content of the document is not in the Council's jurisdiction*. Since the requested record has been disclosed, this portion of the complaint should be dismissed." (Emphasis added.)

Moreover, in Molnar (on behalf of Express-Times) v. Warren County Community College, GRC Complaint No. 2012-04 (Interim Order April 2013), the Complainant stated that when he received requested minutes they were limited in their descriptions. The Complainant asserted that N.J.S.A. 10:4-14 provides that a public body "shall keep reasonably comprehensive minutes of all its meetings. The Council determined that, "...the GRC lacks statutory authority to interpret or apply the provisions of OPMA. As such, the GRC cannot render a decision as to whether the records the Custodian disclosed to him constituted 'reasonably comprehensive minutes of all its meetings' pursuant to OPMA."

Therefore, the Custodian did not unlawfully deny access to the requested minutes based solely upon the sufficiency of the disclosed record's content. See Kwanzaa, supra., citing N.J.S.A. 47:1A-7(b). See also Molnar, supra.

### **Knowing & Willful**

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. The Custodian's November 6, 2012 response was legally insufficient because the Custodian failed to indicate the specific basis for denial of access. N.J.S.A. 47:1A-5(g).
2. The Custodian did not bear her burden of proof that she timely responded to the Complainant's October 25, 2012 request, and two (2) November 15, 2012 OPRA requests. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond in writing to the Complainant's OPRA requests either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA requests pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).
3. The Custodian shall obtain an estimate of the actual cost of duplicating the requested audio tape of the executive session minutes for October 24, 2012, in redacted form from an outside vendor capable of performing the service and provide same to the



Complainant prior to incurring the cost of redacting and duplicating the tape because the Custodian certified that the Board is otherwise unable to redact the record. N.J.S.A. 47:1A-5.b. See also O'Shea v. Pine Hill Board of Education (Camden), GRC Complaint No. 2007-192 (February 2009).

4. **The Custodian shall obtain the estimate in accordance with paragraph 3 above and shall make the amount available to the Complainant within five (5) business days from receipt of the Council's Interim Order. The Custodian shall disclose to the Complainant a copy of the redacted audio tape together with a detailed document index explaining the lawful basis for each redaction upon the Complainant's payment of the vendor charges and within ten (10) business days from receipt of the Council's Interim Order simultaneously provide certified confirmation of compliance in accordance with N.J. Court Rule 1:4-4<sup>10</sup>, to the Executive Director. If the Complainant fails to pay the charges by the tenth (10<sup>th</sup>) business day from receipt of the Council's Interim Order, the Custodian shall provide a certification to that effect in accordance with N.J. Court Rule 1:4-4 to the Executive Director.**
5. It is unnecessary for the Council to consider whether the Custodian unlawfully denied access to any other requested records because on July 21, 2013, the Complainant notified the GRC that he was provided with the records he requested except for the aforementioned copy of the audio tape.
6. The Custodian did not unlawfully deny access to the requested minutes based solely upon the sufficiency of the disclosed record's content. See Kwanzaa v. Department of Corrections, GRC Complaint No. 2004-167 (March 2005), citing N.J.S.A. 47:1A-7(b). See also Molnar (on behalf of Express-Times) v. Warren County Community College, GRC Complaint No. 2012-04 (Interim Order April 2013).
7. 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: John E. Stewart, Esq.

Approved By: Brandon D. Minde, Esq.  
Executive Director

September 17, 2013

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<sup>10</sup> "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

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