



**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**

**March 25, 2014 Government Records Council Meeting**

Michael I. Inzelbuch  
Complainant

Complaint No. 2013-97

v.

Lakewood Board of Education (Ocean)  
Custodian of Record

At the March 25, 2014 public meeting, the Government Records Council (“Council”) considered the March 18, 2014 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council, by a majority vote, adopted the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian complied with the Council’s January 28, 2014 Interim Order because the Custodian in a timely manner forwarded certified confirmation of compliance to the Executive Director wherein he certified that he disclosed to the Complainant the records required to be disclosed under the terms of said Order, not otherwise exempt from disclosure, and explained the lawful basis for redacting certain portions of those records.
2. Although the Custodian failed to respond to the Complainant’s OPRA request in a timely manner and failed to bear his burden of proving that the denial of access to copies of telephone logs, auditing fees and publications regarding legal and/or auditing services, and settlement agreements for certain time periods from April 1, 2012 until December 4, 2012, was authorized by law, he did comply with the terms of the Council’s January 28, 2014 Interim Order. Moreover, the evidence of record does not indicate that the Custodian’s actions had a positive element of conscious wrongdoing or were 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 25<sup>th</sup> Day of March, 2014

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: March 27, 2014**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director  
March 25, 2014 Council Meeting**

**Michael I. Inzelbuch<sup>1</sup>  
Complainant**

**GRC Complaint No. 2013-97**

v.

**Lakewood Board of Education (Ocean)<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:**

December 4, 2012 OPRA Request: The Complainant requests to pick up for immediate review the following:

1. Any and all Board minutes since April 2012 to current – open session.
2. Any and all Board minutes since April 2012 to current – closed session.
3. Any and all communications between the Board its agents, assigns, staff, members, professionals and Michael I. Inzelbuch and any and all responses to same since April 2012.
4. Same as #3 above, however, to or from any and all vendors who provide services to nonpublic students.
5. Same as #4 above, however, with regard to any and all programs, schools, or institutions who provide special educations students(not including SCHI school).
6. Any and all bill lists since April 2012 to current as well as a list of any and all checks written to any and all vendors.
7. Any and all resumes/CVs received since April 2012 to current with regard to the position of Business Administrator, Superintendent and Director of Special Services.
8. Any and all “logs” maintained by the district since April 2012 as to any and all professionals.
9. Any and all communications between the district and DAG Bussing since April 2012.
10. Any and all legal fees associated with any and all litigation with regard to DAG Bussing.
11. Any and all settlement agreements or memorandum of understandings between the Board and DAG.
12. Any and all communications between the Board, its employees, agents, professionals and any and all State Agencies as to the provision of nonpublic services since April 2012 to current.
13. Any and all contracts between the Board, its agents or assigns and those vendors who provide NCLB (including but not limited to Title 1 services) and/or Chapters 192, 193, 226, or IDEIA services – also – any and all correspondences with regard to same.

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

<sup>2</sup> Represented by Eric Andrews, Esq. of Schenck, Price, Smith & King, LLP (Florham Park, NJ).

Michael I. Inzelbuch v. Lakewood Board of Education (Ocean), 2013-97 – Supplemental Findings and Recommendations of the Executive Director

14. A listing of any and all vendors, agencies, individuals who have been providing services to nonpublic children since July 1, 2012, a copy of the contracts and Board approvals.
15. Any and all documentation relied upon in completing the recent "Lakewood Board of Education Auditor's Management Report on Administrative Findings – Financial Compliance and Performance – June 30, 2012."
16. Any and all documented attempts by the Auditing Firm who authored the document in #15 above to speak with Neva Musella, Kathy Napier, Ricky Burton, Ariene Biesda, Jennifer Bunnell, Lisa Miller, and/or Adena Weisz prior to reaching any and all conclusions therein.
17. Any and all settlement agreements the Board has entered into since April 2012 to current and Board approvals of same.
18. Same as #3 above, however, not directly to Michael I. Inzelbuch but regarding Michael I. Inzelbuch.
19. Any and all billing statements or requests for payment as to legal fees and auditing fees since April 2012 as well as any and all disclosures made by said individuals and any and all publications as to their services and any and all requests for proposals/services.
20. Any and all documentation evidencing that billing statements and/or requests for payment have been reviewed and approved for payment.
21. Same as #12 above but as to the former auditor (Bowman and Company). Also – any and all communications to the former auditor and/or received from the former auditor since April 2012.
22. Any and all documents that will evidence the number of special education students who have been placed out of district for the school years 2011-12, 2012-13 and 2010-11.
23. Any and all Board policy(ies), directives, memorandum, statements as to whom form (sic) the district as to whom is authorized to speak with the press.
24. Any and all resolutions and/or memorandum as to N.J.A.C. 6A:23A-5.2(a)(3) since April 2011 to current.
25. Any and all communications received from or sent and/or filings with regard to Energy Analysis Group.
26. Any and all audits and/or reviews of any and all State or Federal programs (public or nonpublic) since April 2012.
27. Any and all policies, memorandum, documentation as to protections against retribution afforded to employees, consultants, professionals who are in possession of information.
28. A copy of any and all publications (in the press) as to professionals currently working for the Board.
29. A copy of any and all Board member disclosures as to the current attorneys and auditor.
30. A copy of any and all documentation and/or communications submitted by the Board's current counsel and auditor to Board members and the Board prior to being retained as well thru and including to current.

December 5, 2012 OPRA Request: The Complainant requests to pick up the following:

1. Any and all communications between Board members and the current district auditors since March 2012 to current.
2. Any and all communications between the Board attorney(s) to third parties as to Board members.

3. Any and all tapes and/or transcripts of Board meetings since June 2012 to current – both closed session and open session.
4. Any and all “sign in sheets” and/or evidence that Board members have reviewed billings of the current attorneys and former attorneys.
5. Any and all assurances by current Board attorney(s) as to their legal billings including, but not limited to, charging the Board no more than a certain amount and/or not to charge the Board after a certain date for attorney(s) associated with the current law firm of the district.
6. Any and all documentation evidencing Board member(s) dissatisfaction with the current and prior Board attorneys.
7. Any and all ethics complaints filed by Board members, district staff, district professionals since September 2010 to current.

**Custodian of Record:** Thomas D’Ambola

**Requests Received by Custodian:** December 4, 2012 and December 5, 2012

**Response Made by Custodian:** December 13, 2012

**GRC Complaint Received:** April 2, 2013

### Background

#### January 28, 2014 Council Meeting:

At its January 28, 2014 public meeting, the Government Records Council (“Council”) considered the January 21, 2014 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council, by a majority vote, adopted the entirety of said findings and recommendations. The Council, therefore, found that:

1. The Custodian did not bear his burden of proof that he timely responded to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian’s failure to respond in writing to the 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 (Interim Order October 31, 2007).
2. The Custodian did not unlawfully deny access to request items numbered 2, 8 (except logs dated July 16, 2012 and August 7, 2012), 10, 11, 14, 16, 19 (disclosures), 24, and 26 of the December 4, 2012 request and item numbers 3 (closed session tapes/transcripts) and 7 of the December 5, 2012 request because the Custodian certified that such records do not exist and the Complainant failed to submit any competent, credible evidence to refute the Custodian’s certification. *See* Pusterhofer v. N.J. Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005).
3. The Complainant’s December 4, 2012 request for items numbered 3, 4, 5, 6, 12, 13, 15, 18, 20, 21, 25, 27, 29, and 30 as well as his December 5, 2012 request for items

- numbered 1, 2, 4, 5, and 6 are invalid under OPRA because they failed to seek specific, identifiable government records. MAG Entm't, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005); Bent v. Stafford Police Dep't, 381 N.J. Super. 30, 37 (App. Div. 2005); NJ Builders Assoc. v. NJ Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).
4. The Custodian failed to bear his burden of proving that the denial of access to item number 17 of the Complainant's December 4, 2012 request was authorized by law. N.J.S.A. 47:1A-6. Therefore, the Custodian must disclose said record.
  5. Because Executive Order No. 26 (McGreevey) provides that the résumés of unsuccessful candidates may be disclosed only where the unsuccessful candidate has consented to such disclosure, and because there is nothing in the evidence of record to indicate that any unsuccessful candidate for the position of Business Administrator, Superintendent, or Director of Special Services gave his or her consent to disclosure of the requested records, the Custodian lawfully denied access to said records.
  6. Because the Custodian determined that the logs dated July 16, 2012 and August 7, 2012 encompassed within request item number 8 were responsive to the Complainant's request, and because the Custodian certified that he would disclose said records to the Complainant, the Custodian shall either disclose the records or provide a certification to the Executive Director in accordance with N.J. Court Rule 1:4-4 setting forth the date upon which the records were disclosed.
  7. The Custodian has failed to bear his burden of proving that the denial of access to the auditing fees and publications regarding legal and/or auditing services that were requested under item number 19 of the December 4, 2012 request was authorized by law. N.J.S.A. 47:1A-6. Therefore, the Custodian must disclose said records to the Complainant or provide a certification to the Executive Director in accordance with N.J. Court Rule 1:4-4 stating that the records do not exist.
  8. The Custodian certified in the Statement of Information, as supplemented by a certification dated December 20, 2013, that he disclosed to the Complainant the records requested as items numbered 1, 7 (résumés of successful applicants), 8 (logs for the period August 30, 2012 to November 2012), 9, 22, 23, and 28 of the December 4, 2012 request and item number 3 (open session tapes/transcripts) of the December 5, 2012 request. As such, it is unnecessary for the Council to conduct an analysis to determine if said records are subject to disclosure.
  9. **The Custodian shall comply with paragraphs #4, #6, and #7 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director.**

10. 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 January 29, 2014, the Council distributed its January 28, 2014 Interim Order to all parties. On February 4, 2014, the Custodian's Counsel informed the GRC that an extensive file search was necessary to locate records and he requested an extension of time until February 21, 2014, in order to comply with the terms of the Council's Order; the GRC granted Counsel's request. Subsequently on the same date, the Complainant e-mailed the GRC inquiring as to the basis for Counsel's request for an extension of time. By reply e-mail on February 4, 2014, the GRC informed the Complainant that an extensive file search was required. On February 21, 2014, the Custodian's Counsel responded to the Council's Interim Order by providing the Custodian's certified confirmation of compliance to the Executive Director wherein the Custodian stated that he disclosed to the Complainant the records in compliance with the Order.

#### Analysis

##### Compliance

On January 28, 2014, the Council ordered the above-referenced compliance. On January 29, 2014, the Council distributed its Interim Order to all parties, providing the Custodian five (5) business days to comply with the terms of said Order. As such, compliance was due on or before February 5, 2014. On February 4, 2014, the fourth (4<sup>th</sup>) business day after the Custodian received the Interim Order, the Custodian's Counsel informed the GRC that an extensive file search was necessary to locate the records subject to disclosure and requested an extension of time until February 21, 2014, in order to comply with the terms of the Council's Order. The GRC granted the requested extension of time. On February 21, 2014, Counsel forwarded the Custodian's certified confirmation of compliance to the Executive Director wherein the Custodian stated that he disclosed to the Complainant the following records:

- Copies of telephone logs for the period July 2012 through August 2012 with names of individual employees redacted pursuant to N.J.S.A. 47:1A-1.1 and N.J.S.A. 47:1A-10.
- Copies of audit fee billing statements and requests for payment for the period April 2012 through December 4, 2012, as well as the Public Notice for the auditor contract.
- A copy of one settlement agreement involving a dispute between the Board of Education and a former employee which the Board entered into between April 2012 and December 4, 2012.

The Custodian further certified that all other settlement agreements which the Board entered into between April 2012 and December 4, 2012 involve special education matters which are exempt from disclosure as student records pursuant to the New Jersey Administrative Code

and the Council's decision in Popkin v. Englewood Board of Education (Bergen), GRC Complaint No. 2011-263 (December 2012).

Therefore, the Custodian complied with the Council's January 28, 2014 Interim Order because the Custodian in a timely manner forwarded certified confirmation of compliance to the Executive Director wherein he certified that he disclosed to the Complainant the records required to be disclosed under the terms of said Order, not otherwise exempt from disclosure, and explained the lawful basis for redacting certain portions of those records.

### **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 (Felder 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 failed to respond to the Complainant's OPRA request in a timely manner and failed to bear his burden of proving that the denial of access to copies of telephone logs, auditing fees and publications regarding legal and/or auditing services, and settlement agreements for certain time periods from April 1, 2012 until December 4, 2012, was authorized by law, he did comply with the terms of the Council's January 28, 2014 Interim Order. Moreover, the evidence of record does not indicate that the Custodian's actions had a positive element of conscious wrongdoing or were 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. The Custodian complied with the Council's January 28, 2014 Interim Order because the Custodian in a timely manner forwarded certified confirmation of compliance to the Executive Director wherein he certified that he disclosed to the Complainant the records required to be disclosed under the terms of said Order, not otherwise exempt from disclosure, and explained the lawful basis for redacting certain portions of those records.
2. Although the Custodian failed to respond to the Complainant's OPRA request in a timely manner and failed to bear his burden of proving that the denial of access to copies of telephone logs, auditing fees and publications regarding legal and/or auditing services, and settlement agreements for certain time periods from April 1, 2012 until December 4, 2012, was authorized by law, he did comply with the terms of the Council's January 28, 2014 Interim Order. Moreover, the evidence of record does not indicate that the Custodian's actions had a positive element of conscious wrongdoing or were 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: Dawn R. SanFilippo, Esq.  
Senior Counsel

March 18, 2014



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

January 28, 2014 Government Records Council Meeting

Michael I. Inzelbuch  
Complainant

Complaint No. 2013-97

v.

Lakewood Board of Education (Ocean)  
Custodian of Record

At the January 28, 2014 public meeting, the Government Records Council (“Council”) considered the January 21, 2014 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council, by a majority vote, adopted the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian did not bear his burden of proof that he timely responded to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian’s failure to respond in writing to the 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 (Interim Order October 31, 2007).
2. The Custodian did not unlawfully deny access to request items numbered 2, 8 (except logs dated July 16, 2012 and August 7, 2012), 10, 11, 14, 16, 19 (disclosures), 24, and 26 of the December 4, 2012 request and item numbers 3 (closed session tapes/transcripts) and 7 of the December 5, 2012 request because the Custodian certified that such records do not exist and the Complainant failed to submit any competent, credible evidence to refute the Custodian’s certification. See Pusterhofer v. N.J. Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005).
3. The Complainant’s December 4, 2012 request for items numbered 3, 4, 5, 6, 12, 13, 15, 18, 20, 21, 25, 27, 29, and 30 as well as his December 5, 2012 request for items numbered 1, 2, 4, 5, and 6 are invalid under OPRA because they failed to seek specific, identifiable government records. MAG Entm’t, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005); Bent v. Stafford Police Dep’t, 381 N.J. Super. 30, 37 (App. Div. 2005); NJ Builders Assoc. v. NJ Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).



4. The Custodian failed to bear his burden of proving that the denial of access to item number 17 of the Complainant's December 4, 2012 request was authorized by law. N.J.S.A. 47:1A-6. Therefore, the Custodian must disclose said record.
5. Because Executive Order No. 26 (McGreevey) provides that the résumés of unsuccessful candidates may be disclosed only where the unsuccessful candidate has consented to such disclosure, and because there is nothing in the evidence of record to indicate that any unsuccessful candidate for the position of Business Administrator, Superintendent, or Director of Special Services gave his or her consent to disclosure of the requested records, the Custodian lawfully denied access to said records.
6. Because the Custodian determined that the logs dated July 16, 2012 and August 7, 2012 encompassed within request item number 8 were responsive to the Complainant's request, and because the Custodian certified that he would disclose said records to the Complainant, the Custodian shall either disclose the records or provide a certification to the Executive Director in accordance with N.J. Court Rule 1:4-4 setting forth the date upon which the records were disclosed.
7. The Custodian has failed to bear his burden of proving that the denial of access to the auditing fees and publications regarding legal and/or auditing services that were requested under item number 19 of the December 4, 2012 request was authorized by law. N.J.S.A. 47:1A-6. Therefore, the Custodian must disclose said records to the Complainant or provide a certification to the Executive Director in accordance with N.J. Court Rule 1:4-4 stating that the records do not exist.
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9. **The Custodian shall comply with paragraphs #4, #6, and #7 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,<sup>1</sup> to the Executive Director.<sup>2</sup>**
10. 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.

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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."

<sup>2</sup> Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

Interim Order Rendered by the  
Government Records Council  
On The 28<sup>th</sup> Day of January, 2014

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: January 29, 2014**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
January 28, 2014 Council Meeting**

**Michael I. Inzelbuch<sup>1</sup>  
Complainant**

**GRC Complaint No. 2013-97**

v.

**Lakewood Board of Education (Ocean)<sup>2</sup>  
Custodial Agency**

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4. Same as #3 above, however, to or from any and all vendors who provide services to nonpublic students.
5. Same as #4 above, however, with regard to any and all programs, schools, or institutions who provide special educations students(not including SCHI school).
6. Any and all bill lists since April 2012 to current as well as a list of any and all checks written to any and all vendors.
7. Any and all resumes/CVs received since April 2012 to current with regard to the position of Business Administrator, Superintendent and Director of Special Services.
8. Any and all “logs” maintained by the district since April 2012 as to any and all professionals.
9. Any and all communications between the district and DAG Bussing since April 2012.
10. Any and all legal fees associated with any and all litigation with regard to DAG Bussing.
11. Any and all settlement agreements or memorandum of understandings between the Board and DAG.
12. Any and all communications between the Board, its employees, agents, professionals and any and all State Agencies as to the provision of nonpublic services since April 2012 to current.
13. Any and all contracts between the Board, its agents or assigns and those vendors who provide NCLB (including but not limited to Title 1 services) and/or Chapters 192, 193, 226, or IDEIA services – also – any and all correspondences with regard to same.

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

<sup>2</sup> Represented by Eric Andrews, Esq. of Schenck, Price, Smith & King, LLP (Florham Park, NJ).

14. A listing of any and all vendors, agencies, individuals who have been providing services to nonpublic children since July 1, 2012, a copy of the contracts and Board approvals.
15. Any and all documentation relied upon in completing the recent "Lakewood Board of Education Auditor's Management Report on Administrative Findings – Financial Compliance and Performance – June 30, 2012."
16. Any and all documented attempts by the Auditing Firm who authored the document in #15 above to speak with Neva Musella, Kathy Napier, Ricky Burton, Ariene Biesda, Jennifer Bunnell, Lisa Miller, and/or Adena Weisz prior to reaching any and all conclusions therein.
17. Any and all settlement agreements the Board has entered into since April 2012 to current and Board approvals of same.
18. Same as #3 above, however, not directly to Michael I. Inzelbuch but regarding Michael I. Inzelbuch.
19. Any and all billing statements or requests for payment as to legal fees and auditing fees since April 2012 as well as any and all disclosures made by said individuals and any and all publications as to their services and any and all requests for proposals/services.
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21. Same as #12 above but as to the former auditor (Bowman and Company). Also – any and all communications to the former auditor and/or received from the former auditor since April 2012.
22. Any and all documents that will evidence the number of special education students who have been placed out of district for the school years 2011-12, 2012-13 and 2010-11.
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24. Any and all resolutions and/or memorandum as to N.J.A.C. 6A:23A-5.2(a)(3) since April 2011 to current.
25. Any and all communications received from or sent and/or filings with regard to Energy Analysis Group.
26. Any and all audits and/or reviews of any and all State or Federal programs (public or nonpublic) since April 2012.
27. Any and all policies, memorandum, documentation as to protections against retribution afforded to employees, consultants, professionals who are in possession of information.
28. A copy of any and all publications (in the press) as to professionals currently working for the Board.
29. A copy of any and all Board member disclosures as to the current attorneys and auditor.
30. A copy of any and all documentation and/or communications submitted by the Board's current counsel and auditor to Board members and the Board prior to being retained as well thru and including to current.

December 5, 2012 OPRA Request: The Complainant requests to pick up the following:

1. Any and all communications between Board members and the current district auditors since March 2012 to current.
2. Any and all communications between the Board attorney(s) to third parties as to Board members.

3. Any and all tapes and/or transcripts of Board meetings since June 2012 to current – both closed session and open session.
4. Any and all “sign in sheets” and/or evidence that Board members have reviewed billings of the current attorneys and former attorneys.
5. Any and all assurances by current Board attorney(s) as to their legal billings including, but not limited to, charging the Board no more than a certain amount and/or not to charge the Board after a certain date for attorney(s) associated with the current law firm of the district.
6. Any and all documentation evidencing Board member(s) dissatisfaction with the current and prior Board attorneys.
7. Any and all ethics complaints filed by Board members, district staff, district professionals since September 2010 to current.

**Custodian of Record:** Thomas D’Ambola

**Requests Received by Custodian:** December 4, 2012 and December 5, 2012

**Response Made by Custodian:** December 13, 2012

**GRC Complaint Received:** April 2, 2013

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

#### Requests and Response:

On December 4, 2012 and December 5, 2012, the Complainant submitted Open Public Records Act (“OPRA”) requests to the Custodian seeking the above-mentioned records. On December 13, 2012, the seventh (7<sup>th</sup>) business day following receipt of the former request, and the sixth (6<sup>th</sup>) business day following receipt of the latter request, the Custodian’s Counsel responded in writing to the Complainant.<sup>4</sup> Counsel informed the Complainant that due to the voluminous nature of the request and the holiday season vacation, the Custodian was seeking an extension of time until February 12, 2013, to grant or deny access to the requested items. On December 13, 2012, the Complainant replied by informing the Custodian that the request for an extension of time was unacceptable.

#### Denial of Access Complaint:

On April 2, 2013, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserts that he filed a previous Denial of Access Complaint on December 16, 2012, because the Custodian denied him access to records he requested on December 4, 2012 and December 5, 2012; however, the Council concluded that the complaint was unripe and dismissed same.<sup>5</sup>

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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> In Counsel’s response to the OPRA requests he stated that both requests were received on December 5, 2012; however, in the Statement of Information the Custodian certified that the requests were received on December 4, 2012 and December 5, 2012.

<sup>5</sup> See Inzelbuch v. Lakewood Board of Education (Ocean), GRC Complaint No. 2012-323 (February 2013).

The Complaint states that he is refiling his complaint because the Custodian stated that he would address his December 4, 2012 and December 5, 2012 requests by February 12, 2013; however, to date the Custodian has failed to address the requests.

Statement of Information:

On April 22, 2013, the Custodian filed a Statement of Information (“SOI”). The Custodian certifies that he received the Complainant’s OPRA requests on December 4, 2012 and December 5, 2012 and responded to both requests on December 13, 2012.

The Custodian certifies that request items numbered 2, 11, 14, 16, 19 (disclosures), and 26 in the December 4, 2012 request do not exist. The Custodian also certifies that the closed session tapes/transcripts sought in item number 3 of the December 5, 2012 request do not exist.

The Custodian further certifies that request items numbered 3, 4, 5, 6, 12, 13, 15, 17, 18, 20, 27, and 29 in the December 4, 2012 request, as well as request items numbered 2, 4, 5, and 6 in the December 5, 2012 request are overly broad and fail to specify a readily identifiable document. The Custodian cites MAG Entm’t, LLC v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005), as legal authority in support of his denial.

The Custodian certifies that request items numbered 1, 7, 8, 9, 10, 19 (legal bills), 28, and 30 in the December 4, 2012 request, as well as the open session minutes sought in item number 3 of the December 5, 2012 request will be provided to the Complainant under separate cover. The Custodian further certifies that request items numbered 21, 22, 23, 24, and 25 in the December 4, 2012 request, as well as request items numbered 1 and 7 in the December 5, 2012 request will be provided to the Complainant under separate cover to the extent that they exist. However, the Custodian also certifies that 2,844 pages of documents and 29 CDs responsive to the Complainant’s request, which represent all responsive non-confidential records, have been provided to the Complainant.

The Custodian certifies that the number and breadth of the Complainant’s requests, along with the Complainant’s handling of this matter, demonstrate that the Complainant filed his OPRA requests and has pursued this matter for the sole purpose of harassing the Board.

Additional Submissions:

On April 23, 2013, the Complainant e-mailed the GRC to acknowledge that he received two (2) boxes of documents and information from the Custodian’s Counsel, but he was uncertain if the records were responsive to his request. On April 28, 2013, the Complainant e-mailed the GRC to state that he inventoried the documentation provided by the Custodian and that the material was either not responsive to his request or incomplete.<sup>6</sup>

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<sup>6</sup> The Complainant copied the Custodian’s Counsel, John Croot, Esq. of Schwartz Simon Edelstein & Celso, with his April 28, 2013 e-mail. Schwartz Simon Edelstein & Celso was the Custodian’s Counsel through submission of the SOI. On December 9, 2013, the GRC copied the Custodian’s present attorney, Mr. Andrews, with the Complainant’s April 28, 2013 e-mail.



On December 5, 2013, the GRC e-mailed the Complainant to determine which of the records the Custodian certified were being disclosed under separate cover, if any, were still outstanding. By reply e-mail this same date the Complainant stated. "The lateness and failure to produce are not acceptable."

On December 5, 2013, the GRC e-mailed the Custodian's Counsel requesting a certification affirming whether the records responsive to the Complainant's request that were pending disclosure had been disclosed. On December 20, 2013, the Custodian's Counsel forwarded to the GRC the Custodian's certification dated December 20, 2013, wherein the Custodian certifies as follows:

- Request item number 1 of the Complainant's December 4, 2012 request: copies of minutes for the period April 2012 through September 2012 were disclosed to the Complainant and minutes for the period October 2012 through December 2012 are available on the Board's website.
- Request item number 7 of the Complainant's December 4, 2012 request: the Custodian cannot provide copies of resumes of unsuccessful candidates for employment positions because only resumes of successful candidates are subject to disclosure pursuant to Executive Order 26.
- Request item number 8 of the Complainant's December 4, 2012 request: the Custodian provided the logs for the period August 30, 2012 through November 2012 and no logs were maintained for the period April 2012 through August 2012 except for logs dated July 16, 2012 and August 7, 2012, which will be forwarded to the Complainant.
- Request item number 9 of the Complainant's December 4, 2012 request: the records were provided to the Complainant.
- Request item number 10 of the Complainant's December 4, 2012 request: the Custodian has not located billings related to DAG Bussing other than those disclosed for Schwartz Simon.
- Request item number 19 of the Complainant's December 4, 2012 request: the Complainant has all requested legal bills in his possession.
- Request item number 21 of the Complainant's December 4, 2012 request: the request is invalid because it is overly broad.
- Request item number 22 of the Complainant's December 4, 2012 request: the records exist and will be forwarded to the Complainant under separate cover.
- Request item number 23 of the Complainant's December 4, 2012 request: By-Law #0146 and Policy #9120 are responsive to the Complainant's request and will be forwarded to the Complainant under separate cover. The policies are also available on the Board's website.
- Request item number 24 of the Complainant's December 4, 2012 request: the records are nonexistent.
- Request item number 25 of the Complainant's December 4, 2012 request: the request is invalid because it is overly broad.
- Request item number 28 of the Complainant's December 4, 2012 request: all responsive records were provided to the Complainant.
- Request item number 30 of the Complainant's December 4, 2012 request: the request is invalid because it is overly broad.

- Request item number 1 of the Complainant's December 5, 2012 request: the request is invalid because it is overly broad.
- Request item number 3 of the Complainant's December 5, 2012 request: Copies of transcripts for meetings held on June 19, 2012 and July 5, 2012 were disclosed to the Complainant and copies of transcripts for the May 10, 2012 and May 31, 2012 meetings have been located and will be provided to the Complainant under separate cover.
- Request item number 7 of the Complainant's December 5, 2012 request: no other ethics complaints exist.

On January 8, 2014, the Custodian's Counsel forwarded to the Complainant a letter wherein Counsel forwarded the following records to the Complainant: (1) a one page document providing information on the number of special education students that were placed out-of-District for the years 2010-2011, 2011-2012 and 2012-2013 in fulfillment of the Complainant's request item number 22 of the December 4, 2012 request; (2) copies of By-Law #0146 and Policy #9120 in fulfillment of the Complainant's request item number 23 of the December 4, 2012 request; and (3) copies of transcripts for the May 10, 2012 and May 31, 2012 Board meetings in fulfillment of the Complainant's request item number 3 of the December 5, 2012 request.

On January 8, 2014, the GRC e-mailed the Complainant requesting that the Complainant forward to the GRC within five (5) business days a certification listing the records that the Complainant requested but that the Custodian either failed to disclose or failed to provide a lawful reason for withholding from disclosure, if any. The Complainant failed to reply to the GRC's request for the certification.

### Analysis

#### 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>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 (Interim Order October 31, 2007).

Here, the Complainant submitted his OPRA requests to the Custodian on December 4, 2012 and December 5, 2012, and the Custodian's Counsel responded in writing to the Complainant on December 13, 2012, informing the Complainant that due to the voluminous nature of the request the Custodian would need an extension of time until February 12, 2013 to

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<sup>7</sup> 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.

grant or deny access to the requested items. The Custodian subsequently failed to grant or deny access to the requested records on or before February 12, 2013.

Therefore, the Custodian did not bear his burden of proof that he timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond in writing to the 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, GRC 2007-11.

### **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.

December 4, 2012 request - items numbered 2, 8 (except logs dated July 16, 2012 and August 7, 2012), 10, 11, 14, 16, 19 (disclosures), 24, and 26

December 5, 2012 request - item numbers 3 (closed session tapes/transcripts) and 7

In Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005), the custodian certified that no records responsive to the complainant's request for billing records existed and the complainant submitted no evidence to refute the custodian's certification regarding said records. The GRC determined that, because the custodian certified that no records responsive to the request existed and no evidence existed in the record to refute the custodian's certification, there was no unlawful denial of access to the requested records.

Here, the Custodian certified that the records responsive to request items numbered 2, 8 (except logs dated July 16, 2012 and August 7, 2012), 10, 11, 14, 16, 19 (disclosures), 24, and 26 of the December 4, 2012 request, as well as item numbers 3 (closed session tapes/transcripts) and 7 of the December 5, 2012 request do not exist.

As such, the Custodian did not unlawfully deny access to request items numbered 2, 8 (except logs dated July 16, 2012 and August 7, 2012), 10, 11, 14, 16, 19 (disclosures), 24, and 26 of the December 4, 2012 request and item numbers 3 (closed session tapes/transcripts) and 7 of the December 5, 2012 request because the Custodian certified that such records do not exist and the Complainant failed to submit any competent, credible evidence to refute the Custodian's certification. *See Pusterhofer*, GRC 2005-49.

December 4, 2012 request - items numbered 3, 4, 5, 6, 12, 13, 15, 17, 18, 20, 21, 25, 27 29, and 30

December 5, 2012 request - items numbered 1, 2, 4, 5, and 6

The New Jersey Appellate Division has held that:

While OPRA provides an alternative means of access to government documents not otherwise exempted from its reach, *it is not intended as a research tool litigants may use to force government officials to identify and siphon useful information. Rather, OPRA simply operates to make identifiable government records “readily accessible for inspection, copying, or examination.” N.J.S.A. 47:1A-1.*

MAG Entm’t, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005)(emphasis added).

The Court reasoned that:

Most significantly, the request failed to identify with any specificity or particularity the governmental records sought. *MAG provided neither names nor any identifiers other than a broad generic description of a brand or type of case prosecuted by the agency in the past.* Such an open-ended demand required the Division's records custodian to manually search through all of the agency's files, analyze, compile and collate the information contained therein, and identify for MAG the cases relative to its selective enforcement defense in the OAL litigation. Further, once the cases were identified, the records custodian would then be required to evaluate, sort out, and determine the documents to be produced and those otherwise exempted.

Id. at 549 (emphasis added).

The Court further held that “[u]nder OPRA, agencies are required to disclose only ‘identifiable’ government records not otherwise exempt ... In short, OPRA does not countenance open-ended searches of an agency's files.” Id. at 549 (emphasis added). Bent v. Stafford Police Dep’t, 381 N.J. Super. 30, 37 (App. Div. 2005);<sup>8</sup> NJ Builders Assoc. v. NJ Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).

Here, in items numbered 3, 4, 5, 6, 12, 13, 15, 18, 20, 21, 25, 27, 29 and 30 of the Complainant’s December 4, 2012 request, as well as items numbered 1, 2, 4, 5, and 6 of the December 5, 2012 request, the Complainant sought “any and all” communications, correspondence, lists, documentation, memoranda, policies, assurances, disclosures, and similar materials. The Complainant provided no specific dates for any of the material in the above-listed request items, much of which was only identified with a broad generic description. The Custodian would have to conduct research to determine what, if any, records might be responsive to the Complainant’s request, and the Custodian is not required under the law to do so.

Accordingly, the Complainant’s December 4, 2012 request for items numbered 3, 4, 5, 6, 12, 13, 15, 18, 20, 21, 25, 27, 29, and 30 as well as his December 5, 2012 request for items numbered 1, 2, 4, 5, and 6 are invalid under OPRA because they failed to seek specific,

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<sup>8</sup> Affirming Bent v. Stafford Police Dep’t, GRC Case No. 2004-78 (October 2004).

identifiable government records. MAG, 375 N.J. Super. at 546; Bent, 381 N.J. Super. at 37; NJ Builders, 390 N.J. Super. at 180; Schuler, GRC 2007-151.

Item number 17 of the December 4, 2012 request seeks “[a]ny and all settlement agreements the Board has entered into since April 2012 to current and Board approvals of same.” This request is very similar to a request examined by the court in Burnett v. Cnty. of Gloucester, 415 N.J. Super. 506 (App. Div. 2010). In Burnett, the plaintiff appealed from an order of summary judgment entered against him in his suit to compel production by the County of Gloucester of documents requested pursuant to OPRA, consisting of “[a]ny and all *settlements, releases or similar documents* entered into, approved or accepted from 1/1/2006 to present.” Id. at 508. (emphasis added). The Appellate Division determined that the request sought a specific type of document, although it did not specify a particular case to which such document pertained, and was therefore not overly broad. Id. at 515-16.

Request item number 17 does not require research, but rather requires the Custodian to locate the requested settlement agreements with their corresponding approvals and provide those records to the Complainant.

Accordingly, the Custodian failed to bear his burden of proving that the denial of access to item number 17 of the Complainant’s December 4, 2012 request was authorized by law. N.J.S.A. 47:1A-6. Therefore, the Custodian must disclose said record.

#### December 4, 2012 request - item number 7

The Custodian stated in his December 20, 2013 certification that the Complainant acknowledged receiving résumés for current employees but wanted the résumés of all applicants. The Custodian stated that he denied the Complainant access to the résumés of unsuccessful applicants pursuant to Executive Order No. 26.

Executive Order No. 26 (McGreevey) provides in relevant part:

No public agency shall disclose the résumés, applications for employment or other information concerning job applicants while a recruitment search is ongoing. The résumés of successful candidates shall be disclosed once the successful candidate is hired. The résumés of unsuccessful candidates may be disclosed after the search has been concluded and the position has been filled, but only where the unsuccessful candidate has consented to such disclosure.

#### E.O. No. 26 (McGreevey)

Here, there is nothing in the evidence of record to indicate that any unsuccessful candidate for the position of Business Administrator, Superintendent, or Director of Special Services gave his/her consent to disclosure of a résumé or curriculum vitae. Therefore, the Custodian properly denied access to said records.

Accordingly, because Executive Order No. 26 (McGreevey) provides that the résumés of unsuccessful candidates may be disclosed only where the unsuccessful candidate has consented to such disclosure, and because there is nothing in the evidence of record to indicate that any unsuccessful candidate for the position of Business Administrator, Superintendent, or Director of Special Services gave his or her consent to disclosure of the requested records, the Custodian lawfully denied access to said records.

December 4, 2012 request - item number 8

The Custodian certified that the logs dated July 16, 2012 and August 7, 2012 encompassed within request item number 8 were to be disclosed to the Complainant; however, there is nothing in the evidence of record to indicate that the Custodian disclosed those records to the Complainant.

Accordingly, because the Custodian determined that the logs dated July 16, 2012 and August 7, 2012 encompassed within request item number 8 were responsive to the Complainant's request, and because the Custodian certified that he would disclose said records to the Complainant, the Custodian shall either disclose the records or provide a certification to the Executive Director in accordance with N.J. Court Rule 1:4-4 setting forth the date upon which the records were disclosed.

December 4, 2012 request - item number 19

The Custodian certified that the Complainant has all legal bills requested in this item. The Custodian also certified that the referenced disclosures in this item do not exist. Moreover, the Complainant in his April 28, 2013 e-mail to the GRC stated that he received a requested RFP which was also requested under this item number. However, the Custodian failed to provide a legal reason for not disclosing the referenced auditing fees and publications regarding legal and/or auditing services that were requested under this item number.

Accordingly, the Custodian has failed to bear his burden of proving that the denial of access to the auditing fees and publications regarding legal and/or auditing services that were requested under item number 19 of the December 4, 2012 request was authorized by law. N.J.S.A. 47:1A-6. Therefore, the Custodian must disclose said records to the Complainant or provide a certification to the Executive Director in accordance with N.J. Court Rule 1:4-4 stating that the records do not exist.

December 4, 2012 request - items numbered 1, 7 (résumés of successful applicants), 8 (logs for the period August 30, 2012 to November 2012), 9, 22, 23, and 28

December 5, 2012 request - item number 3 (open session tapes/transcripts)

The Custodian certified in the SOI, as supplemented by a certification dated December 20, 2013, that he disclosed to the Complainant the records requested as items numbered 1, 7 (résumés of successful applicants), 8 (logs for the period August 30, 2012 to November 2012), 9, 22, 23, and 28 of the December 4, 2012 request and item number 3 (open session

tapes/transcripts) of the December 5, 2012 request.<sup>9</sup> As such, it is unnecessary for the Council to conduct an analysis to determine if said records are subject to disclosure.

### **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 did not bear his burden of proof that he timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond in writing to the 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 (Interim Order October 31, 2007).
2. The Custodian did not unlawfully deny access to request items numbered 2, 8 (except logs dated July 16, 2012 and August 7, 2012), 10, 11, 14, 16, 19 (disclosures), 24, and 26 of the December 4, 2012 request and item numbers 3 (closed session tapes/transcripts) and 7 of the December 5, 2012 request because the Custodian certified that such records do not exist and the Complainant failed to submit any competent, credible evidence to refute the Custodian's certification. See Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005).
3. The Complainant's December 4, 2012 request for items numbered 3, 4, 5, 6, 12, 13, 15, 18, 20, 21, 25, 27, 29, and 30 as well as his December 5, 2012 request for items numbered 1, 2, 4, 5, and 6 are invalid under OPRA because they failed to seek specific, identifiable government records. MAG Entm't, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005); Bent v. Stafford Police Dep't, 381 N.J. Super. 30, 37 (App. Div. 2005); NJ Builders Assoc. v. NJ Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).
4. The Custodian failed to bear his burden of proving that the denial of access to item number 17 of the Complainant's December 4, 2012 request was authorized by law. N.J.S.A. 47:1A-6. Therefore, the Custodian must disclose said record.

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<sup>9</sup> Except for item number 8 of the December 4, 2012 request, records that were promised to be disclosed in the Custodian's December 20, 2013 certification were disclosed in a letter from the Custodian's Counsel to the Complainant dated January 8, 2014.

5. Because Executive Order No. 26 (McGreevey) provides that the résumés of unsuccessful candidates may be disclosed only where the unsuccessful candidate has consented to such disclosure, and because there is nothing in the evidence of record to indicate that any unsuccessful candidate for the position of Business Administrator, Superintendent, or Director of Special Services gave his or her consent to disclosure of the requested records, the Custodian lawfully denied access to said records.
6. Because the Custodian determined that the logs dated July 16, 2012 and August 7, 2012 encompassed within request item number 8 were responsive to the Complainant's request, and because the Custodian certified that he would disclose said records to the Complainant, the Custodian shall either disclose the records or provide a certification to the Executive Director in accordance with N.J. Court Rule 1:4-4 setting forth the date upon which the records were disclosed.
7. The Custodian has failed to bear his burden of proving that the denial of access to the auditing fees and publications regarding legal and/or auditing services that were requested under item number 19 of the December 4, 2012 request was authorized by law. N.J.S.A. 47:1A-6. Therefore, the Custodian must disclose said records to the Complainant or provide a certification to the Executive Director in accordance with N.J. Court Rule 1:4-4 stating that the records do not exist.
8. The Custodian certified in the Statement of Information, as supplemented by a certification dated December 20, 2013, that he disclosed to the Complainant the records requested as items numbered 1, 7 (résumés of successful applicants), 8 (logs for the period August 30, 2012 to November 2012), 9, 22, 23, and 28 of the December 4, 2012 request and item number 3 (open session tapes/transcripts) of the December 5, 2012 request. As such, it is unnecessary for the Council to conduct an analysis to determine if said records are subject to disclosure.
9. **The Custodian shall comply with paragraphs #4, #6, and #7 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,<sup>10</sup> to the Executive Director.<sup>11</sup>**
10. 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.

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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."

<sup>11</sup> Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.



Prepared By: John E. Stewart, Esq.

Approved By: Dawn R. SanFilippo, Esq.  
Senior Counsel

January 21, 2014