



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
101 SOUTH BROAD STREET
PO Box 819
TRENTON, NJ 08625-0819

PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

June 25, 2019 Government Records Council Meeting

Marie W. Collinson
Complainant

Complaint No. 2016-226

v.

Unity Charter School (Morris)
Custodian of Record

At the June 25, 2019 public meeting, the Government Records Council (“Council”) considered the June 18, 2019 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. The Custodian did not fully comply with the Council’s May 21, 2019 Interim Order because although she delivered the responsive records and certified confirmation of compliance, she failed to timely seek an extension of time to respond to the Council Staff.
2. The Custodian unlawfully denied access to portions of the withheld records, she lawfully denied access to the remainder. N.J.S.A. 47:1A-6. Additionally, while the Custodian failed to timely respond to the Council’s May 21, 2019 Interim Order, she ultimately provided the redacted records in accordance with same. Additionally, the evidence of record does not indicate that the Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

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 25th Day of June 2019

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: June 28, 2019

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Council Staff
June 25, 2019 Council Meeting**

**Marie W. Collinson¹
Complainant**

GRC Complaint No. 2016-226

v.

**Unity Charter School (Morris)²
Custodial Agency**

Records Relevant to Complaint: Electronic copies of:

1. The minutes from all the Board of Trustees Personnel Committee’s meetings from this past school year, that is, from September 1, 2015 to June 30, 2016.
2. All the letters Unity’s Board of Trustees received concerning Carolyn Mungo (“Ms. Mungo”) during her time as director.
3. All the letters Unity’s Board of Trustees received concerning Connie Sanchez (“Ms. Sanchez”) during her time as director.
4. The original letter Christine Thorsen submitted concerning her reasons for resigning to the Board of Trustees on or about December 4, 2015, as well as the re-written version the board asked her to submit.
5. The results of the Staff Engagement Survey, including comments, from this past year. The survey was online and closed on March 8, 2016.
6. The results of the Community Engagement Survey, including comments, from this past year. This survey would have been produced a little later in the year than the staff’s survey.

Custodian of Record: Rhonda Curry³

Requests Received by Custodian: July 18, 2016

Response Made by Custodian: July 27, 2016

GRC Complaint Received: August 15, 2016

Background

May 21, 2019 Council Meeting:

At its May 21, 2019 public meeting, the Council considered the May 14, 2019 *In Camera* Findings and Recommendations of the Council Staff and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of the amended findings and recommendations. The Council, therefore, found that:

¹ No representation listed on record.

² Represented by Thomas Johnston, Esq., of Johnston Law Firm, LLC (Montclair, NJ).

³ The original Custodian of Record, and Custodian at the time the Statement of Information was prepared/submitted, was Katine M. Slunt.

1. The Custodian complied with the Council's November 13, 2018 Interim Order because she, through Counsel, responded within the prescribed extended time frame providing records for *in camera* review and certified confirmation of compliance.
2. **On the basis of the Council's determination in this matter, the Custodian shall comply with the Council's Findings of the *In Camera* Examination set forth in the above table within five (5) business days from receipt of this Order. Further, the Custodian shall simultaneously deliver⁴ certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,⁵ to the Council Staff.⁶**
3. Accordingly, excepting the parent's names and e-mail addresses, the Custodian unlawfully denied access to the sender, recipients, date, time, subject, and salutations (where applicable) contained the requested e-mails and letters. See Ray v. Freedom Acad. Charter Sch. (Camden), GRC Complaint No. 2009-185 (Interim Order dated August 24, 2010); 20 U.S.C. 1232g, *et seq.* Thus, the Custodian must disclose these portions of the responsive e-mails and letters to the Complainant.
4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Procedural History:

On May 22, 2019, the Council distributed its Interim Order to all parties. On June 5, 2019, Counsel for the Custodian e-mailed the GRC stating that the production of the responsive records had been delayed due to the Custodian contracting a temporary illness. On June 6, 2019, the GRC responded to Counsel, stating that although the deadline to respond had passed, an extension shall be granted to the end of business on June 12, 2019.

On June 7, 2019, Custodian's Counsel responded to the Council's Interim Order. Counsel included a copy of the records produced to the Complainant in accordance with the Interim Order. Counsel also included a certified confirmation of compliance from the Custodian. The Custodian certified that she received the Interim Order on May 22, 2019, but since then was ill while awaiting receipt of the redacted records from Counsel.

⁴ The certified confirmation of compliance, including supporting documentation, may be sent overnight mail, regular mail, e-mail, facsimile, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives it by the deadline.

⁵ "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."

⁶ 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.

Analysis

Compliance

At its May 21, 2019 meeting, the Council ordered the Custodian to provide the Complainant with the responsive records as amended and to submit certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4, to the Council Staff. On May 22, 2019, the Council distributed its Interim Order to all parties, providing the Custodian five (5) business days to comply with the terms of said Order. Thus, the Custodian's response was due by close of business on May 30, 2019.

On June 5, 2019, the ninth (9th) business day after receipt of the Council's Order, Custodian's Counsel e-mailed the GRC, informing that the Custodian had contracted a temporary illness, causing a delay in complying with the Council's Order. The GRC responded, stating that an extension will be granted to until June 12, 2019 to respond, but noted that the Custodian did not provide a timely notification.

On June 7, 2019, the Counsel responded to the Council's Order, stating that responsive records as amended were provided to the Complainant. Counsel also included a certified confirmation of compliance from the Custodian.

Therefore, the Custodian did not fully comply with the Council's May 21, 2019 Interim Order because although she delivered the responsive records and certified confirmation of compliance, she failed to timely seek an extension of time to respond to the Council Staff.

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 (*id.*; Marley v. Borough of Palmyra, 193 N.J. Super. 271, 294-95 (Law Div. 1993)); 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 unlawfully denied access to portions of the withheld records, she lawfully denied access to the remainder. N.J.S.A. 47:1A-6. Additionally, while the Custodian failed to timely respond to the Council's May 21, 2019 Interim Order, she ultimately provided the redacted records in accordance with same. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Conclusions and Recommendations

The Council Staff respectfully recommends the Council find that:

1. The Custodian did not fully comply with the Council's May 21, 2019 Interim Order because although she delivered the responsive records and certified confirmation of compliance, she failed to timely seek an extension of time to respond to the Council Staff.
2. The Custodian unlawfully denied access to portions of the withheld records, she lawfully denied access to the remainder. N.J.S.A. 47:1A-6. Additionally, while the Custodian failed to timely respond to the Council's May 21, 2019 Interim Order, she ultimately provided the redacted records in accordance with same. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Prepared By: Samuel A. Rosado
Staff Attorney

June 18, 2019



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
101 SOUTH BROAD STREET
PO Box 819
TRENTON, NJ 08625-0819

PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

INTERIM ORDER

May 21, 2019 Government Records Council Meeting

Marie W. Collinson
Complainant

Complaint No. 2016-226

v.

Unity Charter School (Morris)
Custodian of Record

At the May 21, 2019 public meeting, the Government Records Council ("Council") considered the May 14, 2019 Findings and Recommendations of the Council Staff 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 complied with the Council's November 13, 2018 Interim Order because she, through Counsel, responded within the prescribed extended time frame providing records for *in camera* review and certified confirmation of compliance.
2. **On the basis of the Council's determination in this matter, the Custodian shall comply with the Council's Findings of the *In Camera* Examination set forth in the above table within five (5) business days from receipt of this Order. Further, the Custodian shall simultaneously deliver¹ certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,² to the Council Staff.³**
3. Accordingly, excepting the parent's names and e-mail addresses, the Custodian unlawfully denied access to the sender, recipients, date, time, subject, and salutations (where applicable) contained the requested e-mails and letters. See Ray v. Freedom Acad. Charter Sch. (Camden), GRC Complaint No. 2009-185 (Interim Order dated August 24, 2010); 20 U.S.C. 1232g, *et seq.* Thus, the Custodian must disclose these portions of the responsive e-mails and letters to the Complainant.

¹ The certified confirmation of compliance, including supporting documentation, may be sent overnight mail, regular mail, e-mail, facsimile, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives it by the deadline.

² "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."

³ 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.

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

Interim Order Rendered by the
Government Records Council
On The 21st Day of May 2019

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: May 22, 2019

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

***In Camera* Findings and Recommendations of the Council Staff
May 21, 2019 Council Meeting**

**Marie W. Collinson¹
Complainant**

GRC Complaint No. 2016-226

v.

**Unity Charter School (Morris)²
Custodial Agency**

Records Relevant to Complaint: Electronic copies of:

1. The minutes from all the Board of Trustees Personnel Committee's meetings from this past school year, that is, from September 1, 2015 to June 30, 2016.
2. All the letters Unity's Board of Trustees received concerning Carolyn Mungo ("Ms. Mungo") during her time as director.
3. All the letters Unity's Board of Trustees received concerning Connie Sanchez ("Ms. Sanchez") during her time as director.
4. The original letter Christine Thorsen submitted concerning her reasons for resigning to the Board of Trustees on or about December 4, 2015, as well as the re-written version the board asked her to submit.
5. The results of the Staff Engagement Survey, including comments, from this past year. The survey was online and closed on March 8, 2016.
6. The results of the Community Engagement Survey, including comments, from this past year. This survey would have been produced a little later in the year than the staff's survey.

Custodian of Record: Rhonda Curry³

Requests Received by Custodian: July 18, 2016

Response Made by Custodian: July 27, 2016

GRC Complaint Received: August 15, 2016

Records Submitted for *In Camera* Examination: Letters and e-mails responsive to Item Nos. 2, 3, and 4 purported to be exempt in their entirety as personnel records.

¹ No representation listed on record.

² Represented by Thomas Johnston, Esq., of Johnston Law Firm, LLC (Montclair, NJ).

³ The original Custodian, and Custodian at the time the Statement of Information was prepared/submitted, was Katine M. Slunt.

Background

November 13, 2018 Council Meeting:

At its November 13, 2018 public meeting, the Council considered the November 7, 2018 Findings and Recommendations of the Council Staff 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 has borne her burden of proof that she lawfully denied access to Item Nos. 1 and 6 of the Complainant's July 18, 2016 OPRA request, because she certified in the SOI, and the record reflects, that no responsive records exist. N.J.S.A. 47:1A-6; see Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005).
2. The GRC must conduct an *in camera* review of the withheld records responsive to Item Nos. 2, 3, and 4 to determine the validity of the Custodian's assertion that denial of access was valid under the personnel records exemption. See N.J.S.A. 47:1A-10 Paff v. N.J. Dep't of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005).⁴
3. **The Custodian shall deliver⁵ to the Council in a sealed envelope nine (9) copies of the requested unredacted record (see conclusion No. 3 above), a document or redaction index⁶, as well as a legal certification from the Custodian, in accordance with N.J. Court Rules, R. 1:4-4,⁷ that the records provided are the records requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**
4. The Custodian did not unlawfully deny access to the Complainant's OPRA request because she certified, and the record reflects, that she provided all responsive records in existence to the Complainant. N.J.S.A. 47:1A-6; Danis v. Garfield Bd. of Educ. (Bergen), GRC Complaint Nos. 2009-156, 2009-157, 2009-158 (Interim Order dated April 28, 2010) (citing Burns v. Borough of Collingswood, GRC Complaint No. 2005-68 (September 2005)).
5. 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.

⁴ In the Complainant's Amended Complaint, she asserted that the records provided to her on August 25, 2016 were responsive to Item No. 3 of her July 18, 2016 OPRA request. However, the GRC is in agreement with the Custodian's interpretation that the Complainant's July 31, 2016 letter

⁵ The *in camera* records may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives them by the deadline.

⁶ The document or redaction index should identify the record, and/or each redaction asserted and the lawful basis for the denial.

⁷ "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."

Procedural History:

On November 14, 2018, the Council distributed its Interim Order to all parties on. On December 4, 2018, the Custodian's Counsel ("Counsel") notified the GRC that he received a copy of the Council's Interim Order and requested an extension to until January 7, 2019 to produce the records for *in camera* review. On December 5, 2019, the GRC responded, stating that the deadline to respond was November 21, 2018, but noted that consideration can be made if the Order was recently received. That same day, Counsel responded stating that Unity Charter School ("School") received the Interim Order by mail on or about November 28, 2018. Counsel also stated that the School had a new Custodian and provided her contact information. On December 6, 2019, the GRC granted an extension to until the end of business on December 31, 2018.

On December 19, 2019, Counsel responded to the Council's Interim Order. Counsel provided nine (9) copies of records for *in camera* review, as well as a certification from the Custodian. The Custodian certified that the records were responsive to Item Nos. 2, 3, and 4 of the Complainant's OPRA request.

Analysis

Compliance

At its November 13, 2018 meeting, the Council ordered the Custodian to provide nine (9) copies of the records withheld from disclosure deemed to be responsive to the Complainant's OPRA request for an *in camera* review. Further, the Council ordered the Custodian to simultaneously provide certified confirmation of compliance to the GRC. On November 14, 2018, the Council distributed its Interim Order to all parties, providing the Custodian five (5) business days to comply with the terms of said Order. Thus, the Custodian's response was due by close of business on November 21, 2018. Thereafter, the deadline was extended to December 31, 2018 for the Custodian to submit the responsive records.

On December 19, 2018, within the extended time frame to respond to the Council's Order, Counsel responded on behalf of the Custodian providing nine (9) copies of the applicable records. Based on the foregoing and in light of the time extension, the evidence of record supports that both parties complied with the Council's Order.

Therefore, the Custodian complied with the Council's November 13, 2018 Interim Order because she, through Counsel, responded within the extended time frame providing records for *in camera* review and certified confirmation of compliance.

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. N.J.S.A. 47:1A-6.

OPRA also provides that:

Notwithstanding the provisions [OPRA] or any other law to the contrary, the personnel or pension records of any individual in the possession of a public agency, including but not limited to records relating to any grievance filed by or against an individual, shall not be considered a government record and shall not be made available for public access . . .

[N.J.S.A. 47:1A-10.]

OPRA begins with a presumption against disclosure and “proceeds with a few narrow exceptions that . . . need to be considered.” Kovalcik v. Somerset Cnty. Prosecutor’s Office, 206 N.J. 581, 594 (2011). These are:

[A]n individual’s name, title, position, salary, payroll record, length of service, date of separation and the reason therefore, and the amount and type of any pension received shall be government record;

[P]ersonnel or pension records of any individual shall be accessible when required to be disclosed by another law, when disclosure is essential to the performance of official duties of a person duly authorized by this State or the United States, or when authorized by an individual in interest; and

[D]ata contained in information which disclose conformity with specific experiential, educational or medical qualifications required for government employment or for receipt of a public pension, but not including any detailed medical or psychological information, shall be a government record.

[Id.]

Additionally, while OPRA does not expressly define what is covered by “personnel record,” courts have favored the protection of employee confidentiality. See McGee v. Twp. of East Amwell, 416 N.J. Super. 602, 615 (App. Div. 2010). In McGee, the requestor asserted that e-mails between supervisors regarding employee performance were not covered by the exemption because they were not part of the file. Id. at 616. The court disagreed, finding that an employee would expect such communications to remain confidential, even if they’re not memorialized in the employee’s personnel file. Id.

The GRC conducted an *in camera* examination on the submitted record. The results of this examination are set forth in the following table:

Record Number	Record Name/Date	Description of Record	Custodian's Explanation/ Citation for Non-disclosure	Findings of the In Camera Examination⁸
1.	E-mail from Parent C to Tina Bologna dated May 7, 2012 (2 pgs.).	Regarding Ms. Mungo's handling of middle school student discipline.	Personnel record. <u>N.J.S.A. 47:1A-10.</u>	The body of the e-mail contains personnel information beyond what is required by law to be released under OPRA. Therefore, the Custodian lawfully denied access to the body of e-mail and may redact it accordingly. <u>N.J.S.A. 47:1A-10.</u>
2.	Parent Group letter to School Board of Trustees dated June 11, 2012 (3 pgs.).	Regarding Ms. Mungo's handling of teach exist interviews, on-board interviews, middle school curriculum content and student discipline.	Personnel record. <u>N.J.S.A. 47:1A-10.</u>	The body of the letter contains personnel information beyond what is required by law to be released under OPRA. Therefore, the Custodian lawfully denied access to the body of the letter and may redact it accordingly. <u>N.J.S.A. 47:1A-10.</u>
3.	Employee A e-mail to Kirstin Sechler dated	Complaint against Ms. Mungo's review	Personnel record. <u>N.J.S.A. 47:1A-10.</u>	The body of the e-mail contains personnel

⁸ **Unless expressly identified for redaction, everything in the record shall be disclosed.** For purposes of identifying redactions, unless otherwise noted a paragraph/new paragraph begins whenever there is an indentation and/or a skipped space(s). The paragraphs are to be counted starting with the first whole paragraph in each record and continuing sequentially through the end of the record. If a record is subdivided with topic headings, renumbering of paragraphs will commence under each new topic heading. Sentences are to be counted in sequential order throughout each paragraph in each record. Each new paragraph will begin with a new sentence number. If only a portion of a sentence is to be redacted, the word in the sentence which the redaction follows or precedes, as the case may be, will be identified and set off in quotation marks. If there is any question as to the location and/or extent of the redaction, the GRC should be contacted for clarification before the record is redacted. The GRC recommends the redactor make a paper copy of the original record and manually "black out" the information on the copy with a dark colored marker, then provide a copy of the blacked-out record to the requester.

	June 24, 2012 (2 pgs.).	of Employee A's performance.		information beyond what is required by law to be released under OPRA. Therefore, the Custodian lawfully denied access to the body of e-mail and may redact it accordingly. <u>N.J.S.A. 47:1A-10.</u>
4.	Parent A letter to School Board Members dated May 27, 2013 (2 pgs.).	Complaint against Ms. Mungo's management of chickenpox outbreak at school.	Personnel record. <u>N.J.S.A. 47:1A-10.</u>	The body of the letter contains personnel information beyond what is required by law to be released under OPRA. Therefore, the Custodian lawfully denied access to the body of the letter and may redact it accordingly. <u>N.J.S.A. 47:1A-10.</u>
5.	Parent B e-mail to Ms. Mungo dated June 10, 2013 (2 pgs.).	Complaint against Ms. Mungo's management of chickenpox outbreak.	Personnel record. <u>N.J.S.A. 47:1A-10.</u>	The body of the e-mail contains personnel information beyond what is required by law to be released under OPRA. Therefore, the Custodian lawfully denied access to the body of e-mail and may redact it accordingly. <u>N.J.S.A. 47:1A-10.</u>
6.	E-mail from Christine Thorsen ("Ms. Thorsen") to Katine Slunt ("Ms. Slunt")	Resignation e-mail containing personal feelings regarding the School, reasons for resigning,	Personnel record. <u>N.J.S.A. 47:1A-10.</u>	The 1 st half of the first sentence up to and including "that" and the 2 nd and 3 rd sentences of the first paragraph, and the entire third

	dated December 3, 2015 (1 pg.).	and child's education status.		paragraph contain personnel information beyond what is required by law to be released regarding Ms. Thorsen's resignation. Therefore, that portion of the e-mail is exempt from disclosure. <u>N.J.S.A. 47:1A-10.</u> However, the Custodian unlawfully denied access to the remainder of the e-mail and must disclose same. <u>N.J.S.A. 47:1A-6.</u>
7.	Letter from Ms. Thorsen to Ms. Slunt dated January 14, 2016 (1 pg.).	Resignation letter containing husband's employment location, date of relocation, and personal feels on leaving the School.	Personnel record. <u>N.J.S.A. 47:1A-10.</u>	The 2 nd sentence of the first paragraph and the entire second paragraph contain personnel information beyond what is required by law to be released regarding Ms. Thorsen's resignation. Therefore, that portion of the e-mail is exempt from disclosure. <u>N.J.S.A. 47:1A-10.</u> However, the Custodian unlawfully denied access to the remainder of the letter and must disclose same. <u>N.J.S.A. 47:1A-6.</u>

8.	Employee B letter to School Board of Trustees dated May 6, 2016 (1 pg.).	Complaint against Ms. Sanchez's management of school's work environment and specifying issues pertaining to Employee B's health.	Personnel record. <u>N.J.S.A. 47:1A-10.</u>	The body of the letter contains personnel information beyond what is required by law to be released under OPRA. Therefore, the Custodian lawfully denied access to the body of the letter and may redact it accordingly. <u>N.J.S.A. 47:1A-10.</u>
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Additionally, consistent with N.J.S.A. 47:1A-5(g), if the custodian of a government record asserts that part of a particular record is exempt from public access pursuant to OPRA, the custodian must delete or excise from a copy of the record that portion which the custodian asserts is exempt from access and must promptly permit access to the remainder of the record. In prior decisions, the Council has routinely required disclosure of certain information contained within e-mails and letters, to include sender, recipients, date, time, subject, and salutations (where applicable). See Ray v. Freedom Acad. Charter Sch. (Camden), GRC Complaint No. 2009-185 (Interim Order dated August 24, 2010); Verry v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2013-287 (Interim Order dated June 30, 2015). However, in accordance with the Family Educational Rights and Privacy Act, 20 U.S.C. 1232g et seq., the names and e-mail addresses of parents should remain undisclosed.

Accordingly, excepting the parent's names and e-mail addresses, the Custodian unlawfully denied access to the sender, recipients, date, time, subject, and salutations (where applicable) contained the requested e-mails and letters. See Ray, GRC 2009-185; 20 U.S.C. 1232g et seq. Thus, the Custodian must disclose these portions of the responsive e-mails and letters to the Complainant.

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 Council Staff respectfully recommends the Council find that:

1. The Custodian complied with the Council's November 13, 2018 Interim Order because she, through Counsel, responded within the prescribed extended time frame providing records for *in camera* review and certified confirmation of compliance.

2. **On the basis of the Council's determination in this matter, the Custodian shall comply with the Council's Findings of the *In Camera* Examination set forth in the above table within five (5) business days from receipt of this Order. Further, the Custodian shall simultaneously deliver⁹ certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,¹⁰ to the Council Staff.¹¹**
3. Accordingly, excepting the parent's names and e-mail addresses, the Custodian unlawfully denied access to the sender, recipients, date, time, subject, and salutations (where applicable) contained the requested e-mails and letters. See Ray v. Freedom Acad. Charter Sch. (Camden), GRC Complaint No. 2009-185 (Interim Order dated August 24, 2010); 20 U.S.C. 1232g, *et seq.* Thus, the Custodian must disclose these portions of the responsive e-mails and letters to the Complainant.
4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Prepared By: Samuel A. Rosado
Staff Attorney

May 14, 2019

⁹ The certified confirmation of compliance, including supporting documentation, may be sent overnight mail, regular mail, e-mail, facsimile, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives it by the deadline.

¹⁰ "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."

¹¹ 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.



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
101 SOUTH BROAD STREET
PO BOX 819
TRENTON, NJ 08625-0819

PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

INTERIM ORDER

November 13, 2018 Government Records Council Meeting

Marie W. Collinson
Complainant

Complaint No. 2016-226

v.

Unity Charter School (Mercer)
Custodian of Record

At the November 13, 2018 public meeting, the Government Records Council ("Council") considered the November 7, 2018 Findings and Recommendations of the Council Staff and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian has borne her burden of proof that she lawfully denied access to Item Nos. 1 and 6 of the Complainant's July 18, 2016 OPRA request, because she certified in the SOI, and the record reflects, that no responsive records exist. N.J.S.A. 47:1A-6; see Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005).
2. The GRC must conduct an *in camera* review of the withheld records responsive to Item Nos. 2, 3, and 4 to determine the validity of the Custodian's assertion that denial of access was valid under the personnel records exemption. See N.J.S.A. 47:1A-10 Paff v. N.J. Dep't of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005).¹
3. **The Custodian shall deliver² to the Council in a sealed envelope nine (9) copies of the requested unredacted record (see conclusion No. 3 above), a document or redaction index³, as well as a legal certification from the Custodian, in accordance with N.J. Court Rules, R. 1:4-4,⁴ that the records provided are the records requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**

¹ In the Complainant's Amended Complaint, she asserted that the records provided to her on August 25, 2016 were responsive to Item No. 3 of her July 18, 2016 OPRA request. However, the GRC is in agreement with the Custodian's interpretation that the Complainant's July 31, 2016 letter

² The *in camera* records may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives them by the deadline.

³ The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

⁴ "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."



4. The Custodian did not unlawfully deny access to the Complainant's OPRA request because she certified, and the record reflects, that she provided all responsive records in existence to the Complainant. N.J.S.A. 47:1A-6; Danis v. Garfield Bd. of Educ. (Bergen), GRC Complaint Nos. 2009-156, 2009-157, 2009-158 (Interim Order dated April 28, 2010) (citing Burns v. Borough of Collingswood, GRC Complaint No. 2005-68 (September 2005)).
5. 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 13th Day of November, 2018

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 14, 2018

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Council Staff
November 13, 2018 Council Meeting**

**Marie W. Collinson¹
Complainant**

GRC Complaint No. 2016-226

v.

**Unity Charter School (Morris)²
Custodial Agency**

Records Relevant to Complaint: Electronic copies of:

1. The minutes from all the Board of Trustees Personnel Committee's meetings from this past school year, that is, from September 1, 2015 to June 30, 2016.
2. All the letters Unity's Board of Trustees received concerning Carolyn Mungo during her time as director.
3. All the letters Unity's Board of Trustees received concerning Connie Sanchez during her time as director.
4. The original letter Christine Thorsen submitted concerning her reasons for resigning to the Board of Trustees on or about December 4, 2015, as well as the re-written version the board asked her to submit.
5. The results of the Staff Engagement Survey, including comments, from this past year. The survey was online and closed on March 8, 2016.
6. The results of the Community Engagement Survey, including comments, from this past year. This survey would have been produced a little later in the year than the staff's survey.

Custodian of Record: Katine M. Slunt

Requests Received by Custodian: July 18, 2016

Response Made by Custodian: July 27, 2016

GRC Complaint Received: August 15, 2016

Background³

Request and Response:

On July 18, 2016, the Complainant submitted an Open Public Records Act ("OPRA") request to the Custodian seeking the above-mentioned records. On July 27, 2016, the Custodian

¹ No representation listed on record.

² Represented by Thomas Johnston, Esq., of Johnston Law Firm, LLC (Montclair, NJ).

³ 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 Council Staff the submissions necessary and relevant for the adjudication of this complaint.

responded in writing to the Complainant, denying in part and granting in part access to the request items as follows:

1. Denied – “No minutes are presented to the Board from the Personnel Committee”
2. Denied – “Exempted Personnel Records”
3. Denied – “Exempted Personnel Records”
4. Denied – “Exempted Personnel Records”
5. Attached
6. Denied – “The results of the Community Engagement Survey has not been issued”

On July 31, 2016, the Complainant responded to the Custodian, disputing the response. As to Item No. 5, the Complainant stated that what she received was a sanitized version of the Staff Engagement Survey (“Staff Survey”), and did not include all comments accompanying the Survey. As to Item No. 6, the Complainant argued that since the Community Engagement Survey (“Community Survey”) was conducted online, the results should have been ready and available for viewing shortly after closure. Therefore, the results should have been available for disclosure.

Lastly, the Complainant asserted that the requested letters to the Unity Board of Trustees (“Board”) should not be considered personnel records. The Complainant asserted that a personnel file should only contain the individual’s resume, contract, policies, emergency contact information, and evaluations. The Complainant requested that the Custodian provide both versions of Christine Thorsen’s (“Ms. Thorsen”) letter, and letters from three (3) named individuals along with all other letters from the community raising concerns about Carolyn Mungo (“Ms. Mungo”) and Connie Sanchez (“Ms. Sanchez”).

Denial of Access Complaint:

On August 15, 2016, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant’s arguments against denial of access mirrored those contained in her letter to the Custodian dated July 31, 2016.

Supplemental Correspondence

On September 7, 2016, the Complainant e-mailed the GRC, stating that she had received copies of three (3) letters from parents written to the Board. The Complainant asserted that all three (3) letters have been heavily redacted and objected to same on the understanding that the letters would be entered into the Board record, and therefore open to public access.

Statement of Information:

On September 9, 2016 the Custodian filed a Statement of Information (“SOF”). The Custodian certified that she received the Complainant’s OPRA request on July 18, 2016. The Custodian certified that for Item No. 1, she inquired with the Board Personnel Committee Chair, Kirstin Sechler, (“Ms. Sechler”) as to whether minutes were taken during the 2015-2016 school year. The Custodian certified that she was informed that no minutes were taken or submitted to

the Board, nor were any such minutes referenced within the Board's meeting minutes. Therefore, the Custodian certified that no responsive minutes exist.

Regarding Item Nos. 2 and 3, the Custodian certified that she reviewed responsive letters in her possession and inquired with the Board on whether they had additional documents. The Custodian certified that she identified five (5) letters responsive to Item No. 2. The Custodian certified that she compared the contents of the letters with the personnel information subject to disclosure under N.J.S.A. 47:1A-10, and through the advice of counsel, deny access to the records as personnel records. The Custodian argued that while a public employee's conduct is inherently open to public observation, it is also reasonable for an employee to expect that communications regarding his/her performance to superiors would remain confidential. See McGee v. Twp. of East Amwell, 416 N.J. Super. 602, 616 (App. Div. 2010). Thus, the Custodian contended that correspondence from the community consisting of criticisms of an employee's performance should remain confidential.

Regarding Item No. 4, the Custodian asserted that the letters written by Ms. Thorsen contained information outside of what is subject to disclosure under N.J.S.A. 47:1A-10, detailing Ms. Thorsen's personal thoughts, relocation plans, and her husband's employment. Therefore, under advice of counsel, the Custodian stated that she denied access to the records. The Custodian argued that in Kiefer v. Highpoint Reg'l High School, 2010 N.J. Super. Unpub. LEXIS 3115, *9 (App. Div. 2010), the court held that an employee's resignation letter containing the reasons for resigning are personal and outside the scope of access.

As for Item No. 5, the Custodian certified that she provided the responsive records to the Complainant in her July 27, 2016 response.

As for Item No. 6, the Custodian certified that she inquired with Ms. Sechler about the status of the Community Survey. The Custodian certified that she was informed that the results of the survey had not been compiled or formulated. The Custodian certified that at the time of the OPRA request the data was only in raw form, and that aggregation and analysis of the data would occur at the start of the school year. The Custodian certified that because the results of the survey did not yet exist, she did not receive any records to provide to the Complainant.

The Custodian then certified that on July 31, 2016, she received correspondence from the Complainant, and considered the correspondence to be new OPRA request. The Custodian asserted that the Complainant made clarifications to Item Nos. 2 and 3, where she was seeking communications sent to the Board that raised concerns over Ms. Mungo and Ms. Sanchez. The Custodian asserted that these requests are beyond the scope of the current matter.

Amended Complaint

On September 26, 2016, the Complainant submitted an Amended Denial of Access Complaint with the GRC. The Complainant referenced the three (3) e-mails she received from the Custodian and interpreted them to be responsive to Item No. 3 of her July 18, 2016 OPRA request. The Complainant reiterated her issue that the provided e-mails were heavily redacted. However, the Complainant included an OPRA request she submitted on August 1, 2016, which sought "Per

E-mail dated 07/31/2016, ‘the letter from Allen and Susan Ilias, the letter from Matt O’Connell, and all other letters written by members of the community who raised a concern about the current executive director and her actions as well as former director, [Ms. Mungo], and her actions.’”

Regarding Item No.1 of her OPRA request, the Complainant contended that if no Personnel Committee minutes were available, then the Custodian should have provided any notes or memos taken during meetings. Regarding Item No. 5, the Complainant asserted that she received a redacted version of the Staff Survey, as it did not include every comment submitted. The remainder of the complaint detailed the Complainant’s objections to the Custodian’s response, asserting that letters sent to the Board regarding the performance of former executive directors should not be considered personnel records, including Ms. Thorsen’s resignation letters.

On October 3, 2016, the Custodian submitted a response to the Complainant’s Amended Denial of Access Complaint. The Custodian objected to the Complainant’s comments regarding Item No. 1, asserting that the Complainant did not seek “notes” or “memos” in her July 18, 2016 OPRA request, and therefore cannot request them now within her amended complaint.

Additionally, the Custodian asserted that the redacted letters provided to the Complainant were not responsive to Item Nos. 2 & 3 of the Complainant’s July 18, 2016 OPRA request. Rather, the Custodian contended that those records were provided in response to the Complainant’s August 1, 2016 OPRA request, a copy of which was included in the amended complaint. The Custodian maintained that no records were provided in response to Item Nos. 2 & 3 of the July 18, 2016 request.

Regarding Item No. 5, the Custodian asserted that the Complainant revised her request as she did with Item No. 1. The Custodian argued that the Complainant sought the “results” of the survey, which the Custodian interpreted to mean what was provided to the Board for consideration. The Custodian argued that the Complainant changed her request to mean that she sought every comment submitted during the survey, rather than those that were included in the results.

Analysis

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.

Item Nos. 1 & 6

The Council has previously found that, where a custodian certified that no responsive records exist, no unlawful denial of access occurred. See Pusterhofer v. N.J. Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005). Here, the Complainant sought the meeting minutes of the Board’s Personnel Committee over a given period as identified as Item No. 1. The Custodian

denied access to the request, stating that no minutes are presented to the Board from the Personnel Committee. In the SOI, the Custodian certified that she inquired with the Chair of the Personnel Committee, who informed the Custodian that no minutes were taken or submitted to the Board during the 2015-2016 school year. The Custodian also certified that she reviewed the Board meeting minutes for that school year and found no reference to Personnel Committee minutes.

In the Complainant's Amended Complaint, she contended that if no meeting minutes were available, the Custodian should have provided any recorded notes or memos taken during the Personnel Committee meetings. However, such records were not sought in her July 18, 2016 OPRA request. Therefore, the GRC declines to address whether the Custodian should have produced those records.

Regarding Item No. 6, the Custodian certified that Ms. Sechler informed her that the Community Survey results were only in "raw" form and had not yet been compiled or aggregated. The Custodian also certified that the Community Survey was planned to be organized and reviewed at the start of the school year. Thus, the Custodian informed the Complainant that no responsive record exists for Item No. 6.

Accordingly, the Custodian has borne her burden of proof that she lawfully denied access to Item Nos. 1 and 6 of the Complainant's July 18, 2016 OPRA request, because she certified in the SOI, and the record reflects, that no responsive records exist. N.J.S.A. 47:1A-6; see Pusterhofer, GRC 2005-49.

Item Nos. 2, 3, & 4

In Paff v. N.J. Dep't of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005), the complainant appealed a final decision of the Council⁴ that accepted the custodian's legal conclusion for the denial of access without further review. The Appellate Division noted that "OPRA contemplates the GRC's meaningful review of the basis for an agency's decision to withhold government records When the GRC decides to proceed with an investigation and hearing, the custodian may present evidence and argument, but the GRC is not required to accept as adequate whatever the agency offers." Id. The Court stated that:

[OPRA] also contemplates the GRC's *in camera* review of the records that an agency asserts are protected when such review is necessary to a determination of the validity of a claimed exemption. Although OPRA subjects the GRC to the provisions of the 'Open Public Meetings Act,' N.J.S.A. 10:4-6 to -21, it also provides that the GRC 'may go into closed session during that portion of any proceeding during which the contents of a contested record would be disclosed.' N.J.S.A. 47:1A-7(f). This provision would be unnecessary if the Legislature did not intend to permit *in camera* review.

[Id. at 355.]

Further, the Court found that:

⁴ Paff v. N.J. Dep't of Labor, Bd. of Review, GRC Complaint No. 2003-128 (October 2005).

We hold only that the GRC has and should exercise its discretion to conduct *in camera* review when necessary to resolution of the appeal . . . There is no reason for concern about unauthorized disclosure of exempt documents or privileged information as a result of *in camera* review by the GRC. The GRC’s obligation to maintain confidentiality and avoid disclosure of exempt material is implicit in N.J.S.A. 47:1A-7(f), which provides for closed meeting when necessary to avoid disclosure before resolution of a contested claim of exemption.

[Id.]

In the instant matter, the Custodian asserted that records responsive to Item Nos. 2 and 3 were withheld because they were personnel records under N.J.S.A. 47:1A-10. The Custodian contended that the e-mails contained criticisms of Ms. Mungo’s performance during her tenure as Director of Unity Charter School. The Custodian contended that such records did not contain disclosable information under N.J.S.A. 47:1A-10.

Additionally, the Custodian asserted that the contents of the resignation letter(s) requested under Item No. 4 go beyond what is disclosable under N.J.S.A. 47:1A-10, and contain the personal feelings of Ms. Thorsen regarding her employment, her decision to resign, and family plans. However, the Council has previously held that resignation letters are subject to disclosure upon *in camera* review. See Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2011-173 (Interim Order dated August 28, 2012).

Notwithstanding the Custodian’s description of the responsive records, a “meaningful review” is necessary to determine whether all withheld records fall under the personnel records exemption. The GRC must thus review same in order to determine the full applicability of the exemption, which is not without precedent in similar circumstances. See Kupferman v. Long Hill Twp. Bd. of Educ. (Morris), GRC Complaint No. 2007-213 (Interim Order dated November 4, 2009).

Therefore, the GRC must conduct an *in camera* review of the withheld records responsive to Item Nos. 2, 3, and 4 to determine the validity of the Custodian’s assertion that denial of access was valid under the personnel records exemption. See N.J.S.A. 47:1A-10; Paff, 379 N.J. Super. at 346.⁵

Item No. 5

In Danis v. Garfield Bd. of Educ. (Bergen), GRC Complaint Nos. 2009-156, 2009-157, 2009-158 (Interim Order dated April 28, 2010), the Council found that the custodian did not unlawfully deny access to the requested records based on the custodian’s certification that all such records were provided to the complainant. The Council held that the custodian’s certification, in addition to the lack of refuting evidence from the complainant, was sufficient to meet the

⁵ In the Complainant’s Amended Complaint, she asserted that the records provided to her on August 25, 2016 were responsive to Item No. 3 of her July 18, 2016 OPRA request. However, the GRC is in agreement with the Custodian in that the records were provided in response to a separate OPRA request dated August 1, 2016.

custodian's burden of proof. See also Burns v. Borough of Collingswood, GRC Complaint No. 2005-68 (September 2005); Holland v. Rowan Univ., GRC Complaint No. 2014-63, *et seq.* (March 2015).

In the instant matter, the Custodian certified that she provided the Complainant with the Staff Survey as requested under Item No. 5 of her OPRA request. In her July 31, 2016 letter and Amended Complaint, the Complainant argued that the provided record redacted some comments submitted with the survey. The Custodian maintained that the Complainant originally sought the "results" of the Staff Survey, which the Custodian interpreted to mean what was presented to the Board for consideration. The Custodian contended that the Complainant modified her request to include all comments submitted from the survey, rather than those included in what was presented to the Board.

Accordingly, the Custodian did not unlawfully deny access to the Complainant's OPRA request because she certified, and the record reflects, that she provided all responsive records in existence to the Complainant. N.J.S.A. 47:1A-6; Danis, GRC 2009-156, *et seq.* (citing Burns, GRC 2005-68).

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 Council Staff respectfully recommends the Council find that:

1. The Custodian has borne her burden of proof that she lawfully denied access to Item Nos. 1 and 6 of the Complainant's July 18, 2016 OPRA request, because she certified in the SOI, and the record reflects, that no responsive records exist. N.J.S.A. 47:1A-6; see Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005).
2. The GRC must conduct an *in camera* review of the withheld records responsive to Item Nos. 2, 3, and 4 to determine the validity of the Custodian's assertion that denial of access was valid under the personnel records exemption. See N.J.S.A. 47:1A-10 Paff v. N.J. Dep't of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005).⁶
3. **The Custodian shall deliver⁷ to the Council in a sealed envelope nine (9) copies of the requested unredacted record (see conclusion No. 3 above), a document or**

⁶ In the Complainant's Amended Complaint, she asserted that the records provided to her on August 25, 2016 were responsive to Item No. 3 of her July 18, 2016 OPRA request. However, the GRC is in agreement with the Custodian's interpretation that the Complainant's July 31, 2016 letter

⁷ The *in camera* records may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives them by the deadline.

redaction index⁸, as well as a legal certification from the Custodian, in accordance with N.J. Court Rules, R. 1:4-4,⁹ that the records provided are the records requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.

4. The Custodian did not unlawfully deny access to the Complainant's OPRA request because she certified, and the record reflects, that she provided all responsive records in existence to the Complainant. N.J.S.A. 47:1A-6; Danis v. Garfield Bd. of Educ. (Bergen), GRC Complaint Nos. 2009-156, 2009-157, 2009-158 (Interim Order dated April 28, 2010) (citing Burns v. Borough of Collingswood, GRC Complaint No. 2005-68 (September 2005)).
5. 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: Samuel A. Rosado, Esq.
Staff Attorney

November 7, 2018

⁸ The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

⁹ "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."