



**State of New Jersey**  
DEPARTMENT OF COMMUNITY AFFAIRS  
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**PHILIP D. MURPHY**  
*Governor*

**LT. GOVERNOR SHEILA Y. OLIVER**  
*Commissioner*

**FINAL DECISION**

**June 29, 2021 Government Records Council Meeting**

Alfred Savio  
Complainant

Complaint No. 2018-256

v.

West Cape May Board of Education (Cape May)  
Custodian of Record

At the June 29, 2021 public meeting, the Government Records Council (“Council”) considered the June 24, 2021 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 the Council should accept the findings of Honorable Catherine A. Tuohy, Administrative Law Judge, concluding that “. . . based on the record before me, respondent, through Mr. D’Anna, its record custodian, did not knowingly and willfully violate OPRA and did not unreasonably deny access to the requested documents under the totality of the circumstances.” Thus, the Council should adopt the ALJ’s Order directing that the complaint be dismissed.

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 29<sup>th</sup> Day of June 2021

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: July 1, 2021**



**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director  
June 29, 2021 Council Meeting**

**Alfred Savio**<sup>1</sup>  
**Complainant**

**GRC Complaint No. 2018-256**

v.

**West Cape May Board of Education (Cape May)**<sup>2</sup>  
**Custodial Agency**

**Records Relevant to Complaint:**

Request dated October 4, 2018

Copies via e-mail of the 2018-19 contracts for: (1) Interim Superintendent, (2) School Business Administrator, (3) Principal and (4) Board Secretary.

Request dated October 10, 2018

Copies via e-mail of all regular and closed session minutes of the Board of Education meetings from May 1, 2018 to October 10, 2018.

**Custodian of Record:** Todd D'Anna

**Requests Received by Custodian:** October 4, 2018 and October 10, 2018

**Responses Made by Custodian:** October 10, 2018 and October 18, 2018

**GRC Complaint Received:** October 30, 2018

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

February 26, 2020 Council Meeting:

At its February 26, 2020 public meeting, the Government Records Council (“Council”) considered the January 21, 2020 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. Because the evidence of record indicates that the written request submitted by the Complainant clearly invoked OPRA and sought specific identifiable government records, the Custodian’s denial of access pending receipt of an official OPRA request

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

<sup>2</sup> Represented by Brett E.J. Gorman, Esq., of Parker McCay, P.A. (Mount Laurel, NJ).

<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.

Alfred Savio v. West Cape May Board of Education (Cape May), 2018-256 – Supplemental Findings and Recommendations of the Executive Director

form violated OPRA pursuant to N.J.S.A. 47:1A-5(g) and Renna v. County of Union, 407 N.J. Super. 230 (App. Div. 2009). See also Gatson v. Borough of Cliffside Park Police Dep't (Bergen), GRC Complaint No. 2009-239 (October 2010).

2. 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 immediately results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(e), N.J.S.A. 47:1A-5(g), and N.J.S.A. 47:1A-5(i). See Cody v. Middletown Twp. Public Schools, GRC Complaint No. 2005-98 (December 2005). See also Harris v. NJ Dep't of Corr., GRC Complaint No. 2011-65 (August 2012).
3. Notwithstanding the Custodian's "deemed" denial of the Complainant's October 4, 2018 request, the evidence of record reveals that on November 7, 2018, the Custodian disclosed to the Complainant copies of the contracts for the Superintendent and Business Administrator. Therefore, the Custodian granted access to said records. N.J.S.A. 47:1A-6. Further, the Custodian did not unlawfully deny access to the Complainant's request for copies of contracts for the Principal or Board Secretary because the Custodian certified that such records do not exist because the District does not employ a Principal or Board Secretary, and the Complainant failed to submit any competent, credible evidence to refute the Custodian's certification. See Pusterhofer v. NJ Dep't of Educ., GRC Complaint No. 2005-49 (July 2005).
4. The Custodian has borne his burden of proving that he did not unreasonably deny access to the records responsive to the Complainant's October 10, 2018 request. N.J.S.A. 47:1A-6. Specifically, the Custodian directed the Complainant to the Board's website where the responsive records resided. See Rodriguez v. Kean Univ., GRC Complaint No. 2013-69 (March 2014).
5. The unapproved draft executive session minutes of the Board's meetings from May 1, 2018 to October 10, 2018 constitute advisory, consultative or deliberative material, and thus are exempt from access pursuant to N.J.S.A. 47:1A-1.1 and Parave-Fogg v. Lower Alloways Creek Twp., GRC Complaint No. 2006-51 (August 2006). As such, the Custodian has lawfully denied access to said minutes. N.J.S.A. 47:1A-6.
6. The Custodian did not unlawfully deny access to the Complainant's request for the May 2018 regular session minutes because the Custodian certified that such records do not exist because the prior Superintendent failed to complete those minutes, and the Complainant failed to submit any competent, credible evidence to refute the Custodian's certification. See Pusterhofer v. NJ Dep't of Educ., GRC Complaint No. 2005-49 (July 2005).
7. The Custodian did not unlawfully deny access to the requested regular session minutes of the Board's meetings from May 1, 2018 to October 10, 2018 based upon the sufficiency of the disclosed records' content. See Katinsky v. River Vale Twp.,

GRC Complaint No. 2003-68 (November 2003). See also Kwanzaa v. Dep't of Corr., GRC Complaint No. 2004-167 (March 2005), citing N.J.S.A. 47:1A-7(b). Moreover, with respect to the Complainant's allegations that the Custodian violated N.J.S.A. 10:4-14, the GRC notes that the Council's jurisdiction does not extend to the provisions of N.J.S.A. 10:4-14.

8. The Custodian may have willfully and deliberately denied the complainant's request. The Custodian had to have seen the Complainant's October 4, 2018 request based upon his October 10, 2018 reply e-mail seeking submission of the agency's official OPRA request form; however, despite the fact that the Complainant submitted a valid e-mail request on October 4, 2018, and duplicated it on an official OPRA request form on October 10, 2018 at the behest of the Custodian, the Custodian failed to respond to the Complainant's requests. At no time did the Custodian candidly admit to an error on his part, but rather, he certified that he did not address the request because ". . . this OPRA request was not seen and, thus, not responded to." Therefore, it is possible that the Custodian's actions were intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless, or unintentional. As such, this case should be referred to the Office of Administrative Law for determination of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

#### Procedural History:

On February 28, 2020, the Council distributed its February 26, 2020 Interim Order to all parties. On August 17, 2020, the complaint was transmitted to the Office of Administrative Law ("OAL"). On June 10, 2021, the Honorable Catherine A. Tuohy, Administrative Law Judge ("ALJ"), issued an Initial Decision in this matter.<sup>4</sup>

### Analysis

#### Administrative Law Judge's Initial Decision

The ALJ's findings of fact are entitled to deference from the Council because they are based upon the ALJ's determination of the credibility of the parties. "The reason for the rule is that the administrative law judge, as a finder of fact, has the greatest opportunity to observe the demeanor of the involved witnesses and, consequently, is better qualified to judge their credibility." In the Matter of the Tenure Hearing of Tyler, 236 N.J. Super. 478, 485 (App. Div. 1989), *certif. denied* 121 N.J. 615 (1990). The Appellate Division affirmed this principle, underscoring that, "under existing law, the [reviewing agency] must recognize and give due weight to the ALJ's unique position and ability to make demeanor-based judgments." Whasun Lee v. Bd. of Educ. of the Twp. of Holmdel, Docket No. A-5978-98T2 (App. Div. 2000), slip op. at 14. "When such a record, involving lay witnesses, can support more than one factual finding, it is the ALJ's credibility findings that control, unless they are arbitrary or not based on sufficient

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<sup>4</sup> No party filed written exceptions to the ALJ's Initial Decision in a timely manner. Alfred Savio v. West Cape May Board of Education (Cape May), 2018-256 – Supplemental Findings and Recommendations of the Executive Director

credible evidence in the record as a whole.” Cavalieri v. Bd. of Tr. of Pub. Emp. Ret. Sys., 368 N.J. Super. 527, 537 (App. Div. 2004).

The ultimate determination of the agency and the ALJ’s recommendations must be accompanied by basic findings of fact sufficient to support them. State, Dep’t of Health v. Tegnazian, 194 N.J. Super. 435, 442-43 (App. Div. 1984). The purpose of such findings “is to enable a reviewing court to conduct an intelligent review of the administrative decision and determine if the facts upon which the order is grounded afford a reasonable basis therefor.” Id. at 443. Additionally, the sufficiency of evidence “must take into account whatever in the record fairly detracts from its weight”; the test is not for the courts to read only one side of the case and, if they find any evidence there, the action is to be sustained and the record to the contrary is to be ignored (citation omitted). St. Vincent’s Hosp. v. Finley, 154 N.J. Super. 24, 31 (App. Div. 1977).

In the instant complaint, the ALJ issued an Initial Decision on June 10, 2021. See Exhibit A. The ALJ, after fairly summarizing the testimony and evidence, and explaining how she weighed the proofs before her and why she credited, or discredited, certain testimony, stated:

*Although the October 4, 2018, initial email requesting information was indeed a valid OPRA request, Mr. D’Anna mistakenly believed that a formal District OPRA request form was necessary. Although as a business administrator and record custodian for twenty years, Mr. D’Anna should have known it was a valid OPRA request, his actions do not rise to the level of “knowing and willful” conduct.*

*Therefore, I **CONCLUDE** that based on the record before me, respondent, through Mr. D’Anna, its record custodian, did not knowingly and willfully violate OPRA and did not unreasonably deny access to the requested documents under the totality of the circumstances.*

### **ORDER**

*It is **ORDERED** that the GRC complaint against the respondent be **DISMISSED** with prejudice.*

The ALJ’s conclusions are clearly aligned and consistent with the aforementioned credibility determinations. As such, the GRC is satisfied that it can ascertain which testimony the ALJ accepted as fact, and further, finds that those facts provide a reasonable basis for the ALJ’s conclusions.

Therefore, the Council should accept the findings of Honorable Catherine A. Tuohy, ALJ, concluding that “. . . based on the record before me, respondent, through Mr. D’Anna, its record custodian, did not knowingly and willfully violate OPRA and did not unreasonably deny access to the requested documents under the totality of the circumstances.” Thus, the Council should adopt the ALJ’s Order directing that the complaint be dismissed.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that the Council should accept the findings of Honorable Catherine A. Tuohy, Administrative Law Judge, concluding that “. . . based on the record before me, respondent, through Mr. D’Anna, its record custodian, did not knowingly and willfully violate OPRA and did not unreasonably deny access to the requested documents under the totality of the circumstances.” Thus, the Council should adopt the ALJ’s Order directing that the complaint be dismissed.

Prepared By: John E. Stewart  
Staff Attorney

June 24, 2021



**State of New Jersey**  
OFFICE OF ADMINISTRATIVE LAW

**INITIAL DECISION**

OAL DNO. GRC 08311-2020

AGENCY NO. 2018-256

**ALFRED SAVIO,**

Petitioner,

v.

**WEST CAPE MAY BOARD OF  
EDUCATION,**

Respondent.

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**Alfred Savio**, petitioner, pro se

**Emily E. Strawbridge**, Esq., for respondent (Parker McCay, P.A., attorneys)

Record Closed: May 27, 2021

Decided: June 10, 2021

BEFORE **CATHERINE A. TUOHY**, ALJ:

**STATEMENT OF THE CASE**

Petitioner, Alfred Savio, (Dr. Savio), filed a denial of access complaint against the respondent, the West Cape May Board of Education, pursuant to N.J.S.A. 47:1A-1 et seq., the New Jersey Open Public Records Act (OPRA). At issue is whether respondent knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.

## **PROCEDURAL HISTORY**

On October 30, 2018, petitioner filed a denial of access complaint with the Government Records Council (GRC). During its meeting on February 26, 2020, the GRC found that the complaint should be referred to the Office of Administrative Law (OAL) for a fact-finding hearing to determine whether there was a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances. The GRC transmitted the complaint to the OAL, where it was filed on September 8, 2020, as a contested case pursuant to N.J.S.A. 52:14B-1 to 15; N.J.S.A. 52: 14F-1 to 13. A hearing was held on May 27, 2021, and the record closed on that date.

## **FACTUAL DISCUSSIONS AND FINDINGS**

The parties jointly stipulated to the following facts:

1. Todd D'Anna, (Mr. D'Anna), Business Administrator and Board Secretary is the record custodian for the District.
2. On October 4, 2018, petitioner sent a request for records to the District via email. (A true and accurate copy of the October 4, 2018, email is attached hereto as "Exhibit A".)
3. Mr. D'Anna received the emailed request for records on October 10, 2018.
4. Mr. D'Anna's office responded on October 10, 2018, requesting petitioner submit the request through the formal OPRA request form available on the District website. (The October 10, 2018 email is attached hereto as "Exhibit B".)
5. Petitioner thereafter submitted two OPRA request forms on October 10, 2018.



6. Mr. D'Anna provided a response to the document named OPRA Request Form 2 on October 18, 2018. (A true and accurate copy of the October 18, 2018, response is attached hereto as "Exhibit C".)

7. After the response was sent on October 18, 2018, no further communication between petitioner and the District regarding the OPRA request occurred.

8. On October 30, 2018, petitioner filed a Denial of Access Complaint with the GRC. (Exhibit 3 to GRC Complaint 2018-256 Transmittal.)

9. Upon receipt of the October 30, 2018, Denial of Access Complaint, Mr. D'Anna provided a response to the outstanding records request on November 7, 2018. (A true and accurate copy of the November 7, 2018, email response is attached hereto as "Exhibit D".)

10. On August 17, 2020, the GRC transmitted the complaint to the OAL enclosing its findings wherein it issued a determination finding that the District did not unlawfully deny access to petitioner's request based on the responses provided. (GRC Complaint 2018-256, paragraphs 4-17.)

11. The GRC issued a determination that the October 4, 2018, email invoked the OPRA, N.J.S.A. 47: A-1, et seq. (GRC Complaint 2018-256, paragraph 1.)

12. The GRC determined that the District did not bear their burden of proof that they timely responded to petitioner's October 4, 2018, OPRA request. (GRC Complaint 2018-256, paragraph 2.)

13. The GRC determined that there remains a dispute of fact as to whether the custodian willfully and deliberately denied the complainant's request. (GRC Complaint 2018-256, paragraph 8.)

14. The GRC transferred the matter to the OAL for a determination of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances. (GRC Complaint 2018-256, paragraph 8.)

### Testimony

**Todd D'Anna** testified on behalf of the respondent. He is the board secretary and the business administrator for the respondent since July 1, 2018. He works part time one day per week but is responsible for the full financial management of the district including personnel, payroll, pension, healthcare, facilities, technology and the bidding process. He also handles the OPRA requests. Dr. Savio had just left the district as Superintendent on June 30, 2018, before Mr. D'Anna started. Mr. D'Anna did not work with Dr. Savio or know him.

A typical OPRA request comes in on an official OPRA district request form. The official OPRA request form for respondent is on the District's website as is required. The request initially did not come in on the official District OPRA request form. Mr. D'Anna received an email from Dr. Savio, dated October 4, 2018, requesting emailed copies of the 2018-2019 contracts for interim superintendent, school business administrator, principal and board secretary. (R-1.) Mr. D'Anna knew what the intent of the email was but Mr. D'Anna believed a formal OPRA request form had to be filled out before he was required to respond. He responded by email to Dr. Savio, on October 10, 2018, and requested that he fill out the attached OPRA request form and submit it back to him. (R-2.) Dr. Savio responded to Mr. D'Anna after Mr. D'Anna requested that he fill out the official form. (R-3.) The attachment to the email says OPRA request 2. The OPRA request form 2 was the only attachment Mr. D'Anna saw on October 10, 2018. (R-5, bates stamped page R009.) He did not see OPRA request form 1. Mr. D'Anna responded by email on October 18, 2018, to Dr. Savio's OPRA request for Board minutes by directing him to the Board's

website except for the May 2018, minutes which were not typed up by the previous Board secretary and submitted to the Board for approval. (R-6, bated stamped pages R013-R014.) After he sent this email to Dr. Savio, Mr. D'Anna did not receive any further communication from Dr. Savio and believed that the issue was resolved until he received the GRC complaint on October 30, 2018. He first saw OPRA request form 1 (R-4, bated stamped page R005) when he received the complaint and then went back and researched the emails that were sent and found OPRA request form 1. After consultation with respondent's attorney, he gathered the information requested and sent the contracts requested by hard copy and via email to Dr. Savio on November 7, 2018. (R-7, bated stamped pages R015-R016.) After receiving the complaint and realizing there was an OPRA request outstanding, he responded on November 7, 2018. (R-7.)

Mr. D'Anna explained that the crux of the problem in this case is that Google email is odd and what happens is if someone sends an email and then sends a second email before the recipient sees or responds to the first email, the second email is at the top of the email chain and does not come as a separate email. The first email becomes embedded in the email chain. When Mr. D'Anna asked Dr. Savio to make his request on the official District OPRA request form, he received OPRA request 2 and responded to it. Had he scrolled down further in the email he would have noticed there was another OPRA 1 request form attached as a PDF. It was an honest mistake. He believed he only received the second OPRA request. He did not purposely or knowingly deny Dr. Savio's OPRA request made on October 4, 2018. When he first responded to Dr. Savio's request for information, he believed Dr. Savio was required to use the formal District OPRA request form. Dr. Savio did comply and filled out an official OPRA request form. Mr. D'Anna did not know Dr. Savio had sent two OPRA request forms. He did not know of OPRA request form 1 until he received the GRC complaint and went back and did his own research and realized there was an outstanding OPRA request in the email thread and then promptly provided the requested information on November 7, 2018.

Mr. D'Anna has been a school business administrator and record custodian for twenty years. He was not aware an OPRA request could come by email and be a legitimate OPRA request.

No witnesses were produced by Dr. Savio nor did he testify on his own behalf.

Based upon due consideration of the testimonial and documentary evidence presented at this hearing, and having had the opportunity to observe the demeanor of the witness and assess his credibility, I **FIND** the following as additional **FACTS**:

Mr. D'Anna does not know Dr. Savio, the former superintendent and started working for the District on July 1, 2018, after Dr. Savio had already left the District on June 30, 2018.

Mr. D'Anna works one day per week as the part time business administrator and records custodian for the respondent.

Mr. D'Anna mistakenly believed that an OPRA request had to be made using the formal OPRA request form found on the District website.

Mr. D'Anna received Dr. Savio's October 4, 2018, email on October 10, 2018, and requested that Dr. Savio use the official OPRA form available on the District website via email on October 10, 2018.

Mr. D'Anna received Dr. Savio's OPRA request forms 1 and 2 on October 10, 2018, however, Mr. D'Anna only saw OPRA request 2 due to the Google email format and did not notice that there was a prior OPRA request form 1 that had also been sent until he received the GRC complaint on October 30, 2018. Following receipt of the complaint he reviewed the email chain and saw that there had also been an OPRA 1 request form that remained outstanding. Mr. D'Anna responded to the outstanding OPRA 1 request on November 7, 2018.

I further **FIND** as **FACT** that there has been no evidence presented to establish that the respondent, by and through its record custodian, Mr. D'Anna, knowingly and willfully violated OPRA and unreasonably denied access to the requested documents.

## **LEGAL DISCUSSION AND ANALYSIS**

Under the Open Public Records Act (OPRA), N.J.S.A. 47:1A-1 to -13, “government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, with certain exceptions, for the protection of the public interest.” N.J.S.A. 47:1A-1. The act “defines ‘government record’ broadly to include all documents and similar materials, and all information and data, including electronically stored data, that have been made or received by government in its official business.”<sup>1</sup> Asbury Park Press v. Cty. of Monmouth, 406 N.J. Super. 1, 7 (App. Div. 2009), aff’d, 201 N.J. 5 (2010).

Generally, “a custodian of a government record shall grant access to a government record or deny a request for access to a government record as soon as possible, but not later than seven business days after receiving the request, provided that the record is currently available and not in storage or archived.”<sup>2</sup> N.J.S.A. 47:1A-5(i). A custodian’s failure to timely respond to a request “shall be deemed a denial of the request.” Ibid.

A requestor whose access to a government record is denied by a custodian may file a complaint with the Government Records Council (GRC), which has a statutory power to “receive, hear, review and adjudicate a complaint filed by any person concerning a denial of access to a government record by a records custodian.” N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-7. If the GRC determines that “the complaint is within its jurisdiction and

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<sup>1</sup> Specifically, a “government record” is defined as:

any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof, that has been made, maintained or kept on file in the course of his or its official business by any officer, commission, agency or authority of the State or of any political subdivision thereof, including subordinate boards thereof, or that has been received in the course of his or its official business by any such officer, commission, agency, or authority of the State or of any political subdivision thereof, including subordinate boards thereof. The terms shall not include inter-agency or intra-agency advisory, consultative, or deliberative material.

[N.J.S.A. 47:1A-1.1; N.J.A.C. 5:105-1.3.]

<sup>2</sup> “Custodian of a Government Record” or “Custodian” is “in the case of a municipality clerk and in the case of any other public agency, the officer officially designated by formal action of that agency’s director or governing body, as the case may be.” N.J.A.C. 5:105-1.3.

is neither frivolous nor without factual basis, [it] shall proceed with the adjudication process.” N.J.A.C. 5:105-2.1; N.J.S.A. 47:1A-7(e).

If so, the custodian shall provide the GRC and the complainant with a “statement of information,” which is “a written response to a complaint, and all attachments thereto, submitted to the [GRC] by a custodian or his or her representative.” N.J.S.A. 47:1A-7(e); N.J.A.C. 5:105-2.1; N.J.A.C. 5:105-1.3. If the GRC “is unable to make a determination as to a record’s accessibility based upon the complaint and the custodian’s response thereto,” the GRC may transmit the matter to the OAL for a contested-case hearing. N.J.S.A. 47:1A-7(e); N.J.S.A. 52:14B-1 to 1 to -15; N.J.A.C. 5:105-2.7. After a hearing, if it is determined that a custodian “knowingly and willfully violated” OPRA and “is found to have unreasonably denied access under the totality of the circumstances,” the GRC may impose a civil penalty on the custodian. N.J.S.A. 47:1A-7(e); N.J.S.A. 47:1A-11; N.J.A.C. 5:105-2.14. The statutory penalties include “\$1,000 for an initial violation, \$2,500 for a second violation that occurs within 10 years of an initial violation and \$5,000 for a third violation that occurs within 10 years of an initial violation.” N.J.S.A. 47:1A-11.

In addition, OPRA entitles a prevailing requestor to reasonable attorney’s fees. N.J.S.A. 47:1A-7(f); N.J.A.C. 5:105-2.13(a). Specifically, such fees “shall be awarded when the requestor is successful (or partially successful) in obtaining access to government records after a denial of access complaint filed with the [GRC], access was improperly denied and the requested records are disclosed pursuant to a determination of the [GRC] or voluntary settlement agreement between the parties.” N.J.A.C. 5:105-2.13(a).

While the phrase “knowingly and willfully” is not specifically defined in OPRA, “a knowing and willful violation of the statute would require that the custodian must have had actual knowledge that his actions were wrongful, and that there had to be positive element of conscious wrongdoing.” Bart v. City of Paterson Hous. Auth., 403 N.J. Super. 609, 619 (App. Div.2008).

The GRC has, however, used a “definition formulated through several court decisions involving other statutes.” See Jung, et al. v. Borough of Roselle, GRC 07137-

08, Initial Decision (November 18, 2008), adopted, Council (December 10, 2008), <https://njlaw.rutgers.edu/collections/oal/>.

The United States Supreme Court explained that “willful” conduct is not merely negligent.

In common usage the word “willful” is considered synonymous with such words as “voluntary,” “deliberate,” and “intentional.” The word “willful” is widely used in the law, and although it has not by any means been given a perfectly consistent interpretation, it is generally understood to refer to conduct that is not merely negligent.

[McLaughlin v. Richland Shoe Co., 486 U.S. 128, 133 (1988) (citation omitted)].

In Fielder v. Stonack, the New Jersey Supreme Court stated that “[w]illful misconduct is the commission of a forbidden act with actual (not imputed) knowledge that the act is forbidden.” 141 N.J. 101, 124 (1995) (citations omitted). Thus, “willful misconduct need not involve the actual intent to cause harm, [however], there must be some knowledge that the act is wrongful.” Ibid. As such, “willful conduct is not merely negligent; it is much more.” See ibid.

Although the Fielder Court formulated its “willful” standard expressly for police-chase scenarios, its reasoning is pertinent in the context of ethics violations. See Johnson v. Borough of Oceanport (Monmouth), GRC 6746-09, Initial Decision (October 31, 2011), adopted, Council (January 31, 2012), <https://njlaw.rutgers.edu/collections/oal/>; see also Fielder, 141 N.J. at 124. “Both scenarios deal with possible malfeasance of a person charged with protection of the public.” Ibid.

Accordingly, “willful conduct” in violation of OPRA must be intentional and deliberate with knowledge of its wrongfulness, and not merely negligent, heedless, or unintentional. See Exec. Comm’n on Ethical Stds. v. Salmon, 295 N.J. Super. 86, 105–07 (1996); see also N.J.S.A. 47:1A et seq.

The GRC has found a records custodian to have acted “knowingly and willfully” where the custodian was proficient in OPRA procedures, and inexplicably failed to communicate with the requestor or cooperate with the OPRA request. See Jung, GRC 07137-08, Initial Decision (November 18, 2008), adopted, Council (December 10, 2008), <https://njlaw.rutgers.edu/collections/oal/>. The decision held that the custodian’s lack of communication, cooperation, and timeliness amounted to willful misconduct. Ibid.; see also Bart v. City of Paterson Hous. Auth., GRC 09423-06, Final Decision (May 30, 2007), <https://njlaw.rutgers.edu/collections/oal/> (where the custodian failed to submit documents to a complainant who frequently engaged with the agency. The custodian testified that she did not like the complainant. Thus, the ALJ found that the custodian’s ill-will toward the complainant made her less likely to comply with the OPRA request, and therefore her actions amounted to a knowing and willful violation).

On the other hand, having a haphazard system of preserving and retrieving records does not rise to the level of willful conduct. In Johnson v. Borough of Oceanport, the complainant submitted two OPRA requests to the Borough of Oceanport. Johnson, GRC 6746-09, Initial Decision (October 31, 2011), <https://njlaw.rutgers.edu/collections/oal/html/>. The ruling concluded that it is “quite clear that there can be no presumption of ‘willful’ misconduct arising simply from the failure of a public official to respond in a timely fashion to a request” or from acting “negligent or heedless” when attempting to comply with OPRA. Ibid.; see also Doss v. Borough of Paramus (Bergen), GRC 11319-15, Initial Decision (August 4, 2016), <https://njlaw.rutgers.edu/collections/oal/html/> (where the custodian did not knowingly and willfully violate OPRA when she erroneously referred the complainant to a different agency and was ordered by the GRC to perform a more thorough search).

In the instant matter, Mr. D’Anna, the record custodian worked for respondent one day per week. He received Dr. Savio’s October 4, 2018 email requesting information on October 10, 2018. Mr. D’Anna mistakenly believed an OPRA request had to be on the formal/official District OPRA request form that was maintained on the District’s website. Mr. D’Anna advised Dr. Savio in his email of October 10, 2018, to fill out the District’s OPRA request form and return to him. Dr. Savio did so in his email back to Mr. D’Anna on October 10, 2018. However, Dr. Savio sent two separate OPRA request forms 1 and



2. Mr. D'Anna was only expecting one OPRA request form and because of the configuration of his google email, only saw OPRA request 2 as the most recent email and did not see OPRA request 1 which was embedded in the same email. Mr. D'Anna responded to OPRA request 2 on October 18, 2018, via email and believed he was in compliance with Dr. Savio's request. There were no further communications between Dr. Savio and Mr. D'Anna regarding any outstanding OPRA requests. It was not until Mr. D'Anna received the denial of access complaint from the GRC was he aware that there was an outstanding OPRA request form 1. He went back to the email chain of October 10, 2018, and then realized that the OPRA 1 request form was also contained in that email and that he had not previously seen it. After discovering his mistake, he then gathered the requested contracts and promptly provided them to Dr. Savio on November 7, 2018. There is no evidence that Mr. D'Anna harbored any ill will towards Dr. Savio as they did not work together and did not know each other since Dr. Savio left the District before Mr. D'Anna started as business administrator and record custodian.

Although the October 4, 2018, initial email requesting information was indeed a valid OPRA request, Mr. D'Anna mistakenly believed that a formal District OPRA request form was necessary. Although as a business administrator and record custodian for twenty years, Mr. D'Anna should have known it was a valid OPRA request, his actions do not rise to the level of "knowing and willful" conduct.

Therefore, I **CONCLUDE** that based on the record before me, respondent, through Mr. D'Anna, its record custodian, did not knowingly and willfully violate OPRA and did not unreasonably deny access to the requested documents under the totality of the circumstances.

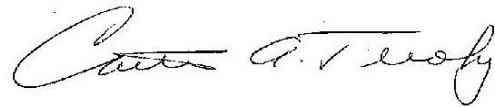
### **ORDER**

It is **ORDERED** that the GRC complaint against the respondent be **DISMISSED** with prejudice.

I hereby **FILE** my initial decision with the **GOVERNMENT RECORDS COUNCIL** for consideration.

This recommended decision may be adopted, modified or rejected by the **GOVERNMENT RECORDS COUNCIL**, who by law is authorized to make a final decision in this matter. If the Government Records Council does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **EXECUTIVE DIRECTOR OF THE GOVERNMENT RECORDS COUNCIL, 101 South Broad Street, PO Box 819, Trenton, New Jersey 08625-0819**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.



June 10, 2021  
\_\_\_\_\_  
DATE

\_\_\_\_\_  
**CATHERINE A. TUOHY, ALJ**

Date Received at Agency: \_\_\_\_\_

Date Mailed to Parties: \_\_\_\_\_

CAT/tat

**APPENDIX**

**WITNESSES**

For Petitioner:

None

For Respondent:

Todd D'Anna

**EXHIBITS**

Joint

Exhibit A - October 4, 2018, email from petitioner (R-1)

Exhibit B - October 10, 2018, email from Mr. D'Anna (R-2)

Exhibit C - Mr. D'Anna's October 18, 2018, email response to the document named OPRA Request Form 2 (R-6)

Exhibit D – Mr. D'Anna's November 7, 2018, email response to the outstanding records request (R-7)

For Petitioner:

None

For Respondent:

R-1 October 4, 2018, email from petitioner (Exhibit A)

R-2 October 10, 2018, response from Mr. D'Anna (Exhibit B)

R-3 2018 OPRA request email chain

R-4 Petitioner's OPRA request form, dated October 10, 2018

R-5 Petitioner's OPRA request form 2

- R-6 October 18, 2018, response to OPRA request (Exhibit C)
- R-7 November 7, 2018, response to OPRA request (Exhibit D)



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**

**February 26, 2020 Government Records Council Meeting**

Alfred Savio  
Complainant

Complaint No. 2018-256

v.

West Cape May Board of Education (Cape May)  
Custodian of Record

At the February 26, 2020 public meeting, the Government Records Council (“Council”) considered the January 21, 2020 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. Because the evidence of record indicates that the written request submitted by the Complainant clearly invoked OPRA and sought specific identifiable government records, the Custodian’s denial of access pending receipt of an official OPRA request form violated OPRA pursuant to N.J.S.A. 47:1A-5(g) and Renna v. County of Union, 407 N.J. Super. 230 (App. Div. 2009). See also Gatson v. Borough of Cliffside Park Police Dep’t (Bergen), GRC Complaint No. 2009-239 (October 2010).
2. 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 immediately results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5(e), N.J.S.A. 47:1A-5(g), and N.J.S.A. 47:1A-5(i). See Cody v. Middletown Twp. Public Schools, GRC Complaint No. 2005-98 (December 2005). See also Harris v. NJ Dep’t of Corr., GRC Complaint No. 2011-65 (August 2012).
3. Notwithstanding the Custodian’s “deemed” denial of the Complainant’s October 4, 2018 request, the evidence of record reveals that on November 7, 2018, the Custodian disclosed to the Complainant copies of the contracts for the Superintendent and Business Administrator. Therefore, the Custodian granted access to said records. N.J.S.A. 47:1A-6. Further, the Custodian did not unlawfully deny access to the Complainant’s request for copies of contracts for the Principal or Board Secretary because the Custodian certified that such records do not exist because the District does not employ a Principal or Board Secretary, and the Complainant failed to submit any competent, credible evidence to refute the Custodian’s certification. See Pusterhofer v. NJ Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005).



4. The Custodian has borne his burden of proving that he did not unreasonably deny access to the records responsive to the Complainant's October 10, 2018 request. N.J.S.A. 47:1A-6. Specifically, the Custodian directed the Complainant to the Board's website where the responsive records resided. See Rodriguez v. Kean Univ., GRC Complaint No. 2013-69 (March 2014).
5. The unapproved draft executive session minutes of the Board's meetings from May 1, 2018 to October 10, 2018 constitute advisory, consultative or deliberative material, and thus are exempt from access pursuant to N.J.S.A. 47:1A-1.1 and Parave-Fogg v. Lower Alloways Creek Twp., GRC Complaint No. 2006-51 (August 2006). As such, the Custodian has lawfully denied access to said minutes. N.J.S.A. 47:1A-6.
6. The Custodian did not unlawfully deny access to the Complainant's request for the May 2018 regular session minutes because the Custodian certified that such records do not exist because the prior Superintendent failed to complete those minutes, and the Complainant failed to submit any competent, credible evidence to refute the Custodian's certification. See Pusterhofer v. NJ Dep't of Educ., GRC Complaint No. 2005-49 (July 2005).
7. The Custodian did not unlawfully deny access to the requested regular session minutes of the Board's meetings from May 1, 2018 to October 10, 2018 based upon the sufficiency of the disclosed records' content. See Katinsky v. River Vale Twp., GRC Complaint No. 2003-68 (November 2003). See also Kwanzaa v. Dep't of Corr., GRC Complaint No. 2004-167 (March 2005), citing N.J.S.A. 47:1A-7(b). Moreover, with respect to the Complainant's allegations that the Custodian violated N.J.S.A. 10:4-14, the GRC notes that the Council's jurisdiction does not extend to the provisions of N.J.S.A. 10:4-14.
8. The Custodian may have willfully and deliberately denied the complainant's request. The Custodian had to have seen the Complainant's October 4, 2018 request based upon his October 10, 2018 reply e-mail seeking submission of the agency's official OPRA request form; however, despite the fact that the Complainant submitted a valid e-mail request on October 4, 2018, and duplicated it on an official OPRA request form on October 10, 2018 at the behest of the Custodian, the Custodian failed to respond to the Complainant's requests. At no time did the Custodian candidly admit to an error on his part, but rather, he certified that he did not address the request because "... this OPRA request was not seen and, thus, not responded to." Therefore, it is possible that the Custodian's actions were intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless, or unintentional. As such, this case should be referred to the Office of Administrative Law for determination of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Interim Order Rendered by the  
Government Records Council  
On The 26<sup>th</sup> Day of February 2020

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: February 28, 2020**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
February 26, 2019 Council Meeting**

**Alfred Savio**<sup>1</sup>  
**Complainant**

**GRC Complaint No. 2018-256**

v.

**West Cape May Board of Education (Cape May)**<sup>2</sup>  
**Custodial Agency**

**Records Relevant to Complaint:**

Request dated October 4, 2018

Copies via e-mail of the 2018-19 contracts for: (1) Interim Superintendent, (2) School Business Administrator, (3) Principal and (4) Board Secretary.

Request dated October 10, 2018

Copies via e-mail of all regular and closed session minutes of the Board of Education meetings from May 1, 2018 to October 10, 2018.

**Custodian of Record:** Todd D'Anna

**Requests Received by Custodian:** October 4, 2018 and October 10, 2018

**Responses Made by Custodian:** October 10, 2018 and October 18, 2018

**GRC Complaint Received:** October 30, 2018

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

Request and Response:

On October 4, 2018, the Complainant e-mailed an Open Public Records Act ("OPRA") request to the Custodian seeking the above-mentioned records. On October 10, 2018, the third (3<sup>rd</sup>) business day following receipt of said request, the Custodian responded in writing via reply e-mail advising the Complainant to fill out and return the Custodian's OPRA request form. On October 10, 2018, the Complainant complied with the Custodian's instructions.

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

<sup>2</sup> Represented by Brett E.J. Gorman, Esq., of Parker McCay, P.A. (Mount Laurel, NJ).

<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.



### Request and Response:

On October 10, 2018, the Complainant submitted an OPRA request to the Custodian seeking the above-mentioned records. On October 18, 2018, the sixth (6<sup>th</sup>) business day following receipt of said request, the Custodian responded in writing informing the Complainant that the open session minutes were available on the West Cape May Board of Education (“Board”) website. The Custodian further informed the Complainant that the minutes for May 2018, as well as the requested executive session minutes, are under legal review.

### Denial of Access Complaint:

On October 30, 2018, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that he submitted an OPRA request to the Custodian via e-mail on October 4, 2018. The Complainant stated that the e-mail was clearly identified in the subject line as an OPRA request, and sought four (4) employment contracts. The Complainant further stated that he received a response from the Custodian on October 10, 2018, wherein the Custodian required him to submit the request on the agency’s official OPRA request form. The Complainant asserted that pursuant to Renna v. Cnty. of Union a written request cannot be denied solely because it is not on the agency’s official OPRA request form. The Complainant alleged that the Custodian, by requiring him to resubmit the request on the agency’s official request form, violated OPRA. The Complainant stated that on October 10, 2018, he resubmitted the OPRA request on the agency’s official form; however, the Custodian did not subsequently respond or fulfill the request. The Complainant further asserted that because he requested contracts, which are immediately access records, the request should have been addressed immediately.

The Complainant stated that he submitted another OPRA request to the Custodian on October 10, 2018 for Board meeting minutes from May 1, 2018 to October 10, 2018. The Complainant stated that on October 18, 2018, he received an e-mail response from the Custodian informing him that the regular session minutes are available on the Board’s website with the exception of the May minutes. The Complainant stated that the Custodian also informed him that the Board’s attorney is working to resolve the issue concerning the posting of the May minutes as well as the closed session minutes. The Complainant asserted that as of the date of the complaint the Custodian has failed to provide the requested minutes.

The Complainant further stated that the minutes posted on the website include references to attachments that are not posted. The Complainant stated that this is a violation of N.J.S.A. 10:4-14, which requires that reasonably comprehensive minutes be promptly available to the public.

### Statement of Information:

On November 8, 2018, the Custodian filed a Statement of Information (“SOF”). The Custodian certified that he received the Complainant’s OPRA request on October 10, 2018, and responded in writing on October 18, 2018. The Custodian certified that the Complainant’s request for contracts for the Interim Superintendent, Business Administrator, Principal and Board

Secretary was not initially seen by him and therefore not addressed. However, the Custodian certified that he has since sent copies of the contracts for the Superintendent and Business Administrator to the Complainant. The Custodian certified that there are no copies of records for the Principal or Board Secretary because the District does not employ a Principal or Board Secretary.

The Custodian certified that with respect to the Complainant's request for regular and closed session minutes of the Board's meetings from May 1, 2018 to October 10, 2018, the Complainant was directed to the website where all regular minutes are posted. The Custodian further certified that he informed the Complainant that executive session minutes were under review by the Board's attorney. The Custodian certified that he has since e-mailed all requested regular and executive session minutes to the Complainant. The Custodian attached to the SOI a copy of an e-mail to the Complainant dated November 7, 2018, wherein the Custodian states that he attached copies of the contracts for the Superintendent and Business Administrator, along with copies of all requested minutes. The Custodian certified that he cannot disclose the May 2018 minutes because the prior Superintendent failed to complete the minutes for that month.

#### Additional Submissions:

On December 3, 2018, in response to the Custodian's SOI, the Complainant submitted to the GRC a certification pursuant to R. 1:4-4. The Complainant certified that although there are various attachments referenced in the minutes responsive to his OPRA request that are posted on the website, the attachments are included with the minutes. The Complainant certified that some of the attachments that were referenced but not included are personnel items #11-13, agendas, line-item transfers and a Delta T contract. The Complainant further certified that the Custodian alleged that he missed the Complainant's second OPRA request, which means that the Custodian was unresponsive to the request.

### Analysis

#### Form of Complainant's OPRA Request

OPRA sets forth the elements of a proper records request by providing that "a request for access to a government record shall be in writing and hand-delivered, mailed, transmitted electronically, or otherwise conveyed to the appropriate custodian." N.J.S.A. 47:1A-5(g). Here, the Complainant submitted his October 4, 2018 OPRA request to the Custodian in the form of e-mail correspondence. The evidence of record reveals that the e-mail was identified in the subject line as an OPRA request. The Custodian responded to the request by informing the Complainant to complete and return the agency's official OPRA request form which the Custodian attached to the response.

N.J.S.A. 47:1A-5(f) provides that "[t]he custodian of a public agency shall adopt a form for the use of any person who requests access to a government record held or controlled by the public agency. However, in Renna v. Cnty. of Union, 407 N.J. Super. 230 (App. Div. 2009), the Appellate Division held that, although requestors should use public agencies' OPRA request forms when making requests, no custodian shall withhold requested records if the request for such records, not presented on the official form, contains the requisite information prescribed in

the section of OPRA requiring custodians to adopt a form. Id. In effect, this permits requesters to write their own correspondence requesting records from a custodian, as long as the request properly invokes OPRA. Thereafter, the Council held in Gatson v. Borough of Cliffside Park Police Dep't (Bergen), GRC Complaint No. 2009-239 (October 2010) that, “[b]ecause a custodian may not refuse a request for records made under OPRA which is in writing and clearly invokes OPRA, and because the evidence of record indicates that the request form used by the Complainant clearly invoked OPRA, the Custodian’s denial of access to the records requested violates OPRA” (citations omitted).

Here, although the Custodian denied the Complainant’s October 4, 2018 request pending receipt of the Board’s official OPRA request form, the evidence of record reveals that the Complainant’s request was in writing and properly invoked OPRA. Moreover, the request sought specific identifiable records.

Therefore, because the evidence of record indicates that the written request submitted by the Complainant clearly invoked OPRA and sought specific identifiable government records, the Custodian’s denial of access pending receipt of an official OPRA request form violated OPRA pursuant to N.J.S.A. 47:1A-5(g) and Renna v. County of Union, 407 N.J. Super. 230 (App. Div. 2009). See also Gatson, GRC 2009-239.

### **Timeliness**

Unless a shorter time period is otherwise provided, a custodian must 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 accordingly 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>4</sup> Thus, a custodian’s failure to respond in writing to a complainant’s OPRA request, either granting access, denying access, seeking clarification, or requesting an extension of time within the statutorily mandated seven (7) business days, results in a “deemed” denial of the complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).

Likewise, barring extenuating circumstances, a custodian’s failure to respond immediately in writing to a complainant’s OPRA request for immediate access records, either granting access, denying access, seeking clarification, or requesting an extension of time, also results in a “deemed” denial of the request pursuant to N.J.S.A. 47:1A-5(e), N.J.S.A. 47:1A-5(g), and N.J.S.A. 47:1A-5(i).<sup>5</sup> See Cody v. Middletown Twp. Public Schools, GRC Complaint No. 2005-98 (December 2005) and Harris v. NJ Dep’t of Corr., GRC Complaint No. 2011-65 (August 2012). See also Herron v. Twp. of Montclair, GRC Complaint No. 2006-178 (February

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<sup>4</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.

<sup>5</sup> OPRA lists immediate access records as “budgets, bills, vouchers, contracts, including collective negotiations agreements and individual employment contracts, and public employee salary and overtime information.” N.J.S.A. 47:1A-5(e). The Council has also determined that purchase orders and invoices are immediate access records. See Kohn v. Twp. of Livingston (Essex), GRC Complaint No. 2012-03 (April 2013).

2007), holding that the custodian was obligated to immediately notify the complainant as to the status of immediate access records.

Here, the evidence of record reveals that the Custodian received the Complainant's OPRA request on October 4, 2018, because on October 10, 2018, *via reply e-mail*, the Custodian transmitted the agency's official OPRA request form to the Complainant and asked him to complete and return it. On October 10, 2018, the evidence of record reveals that the Complainant returned the completed form to the Custodian. Thereafter, the Custodian failed to address the request, despite the fact the request was for immediate access records. The Custodian on November 7, 2018, inexplicably certified in the SOI that the request was not initially seen by him, and on that same date e-mailed the responsive records to the Complainant. Further, the Custodian failed to provide an explanation that would reasonably justify a delay in access to the requested records.

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 immediately results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(e), N.J.S.A. 47:1A-5(g), and N.J.S.A. 47:1A-5(i). See Cody, GRC 2005-98. See also Harris, GRC 2011-65.

### **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.

### **Request dated October 4, 2018 – copies of 2018-19 contracts for the Interim Superintendent, Business Administrator, Principal and Board Secretary**

In Pusterhofer v. NJ 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 contracts requested for the Principal or Board Secretary do not exist because the District does not employ a Principal or Board Secretary. However, the Custodian certified that he disclosed copies of the requested contracts for the Superintendent and Business Administrator to the Complainant on November 7, 2018,

As such, notwithstanding the Custodian's "deemed" denial of the Complainant's October 4, 2018 request, the evidence of record reveals that on November 7, 2018, the Custodian

disclosed to the Complainant copies of the contracts for the Superintendent and Business Administrator. Therefore, the Custodian granted access to said records. N.J.S.A. 47:1A-6. Further, the Custodian did not unlawfully deny access to the Complainant's request for copies of contracts for the Principal or Board Secretary because the Custodian certified that such records do not exist because the District does not employ a Principal or Board Secretary, and the Complainant failed to submit any competent, credible evidence to refute the Custodian's certification. See Pusterhofer, GRC 2005-49.

Request dated October 10, 2018 – copies of regular and closed session minutes of Board meetings from May 1, 2018 to October 10, 2018

Here, the Custodian in his October 18, 2018 response informed the Complainant that the open session minutes were available on the Board's website, and that the minutes for May 2018, as well as the requested executive session minutes, were under legal review. Although the evidence of record revealed that the Complainant was able to access the records on the referenced website, the Complainant alleged that the Custodian failed to provide the requested minutes.

In Rodriguez v. Kean Univ., GRC Complaint No. 2013-69 (March 2014), the Council noted that

[A]vailability of Internet, as well as technological capability in general, has greatly increased. Many New Jerseyans turn to the Internet to conduct business with government, including electronically filing taxes, renewing motor vehicle registrations, paying penalties for motor vehicle violations, and making OPRA requests. Indeed, the Legislature signified its awareness of this fact by passing a statute requiring “[a]ny State authority, board, or commission, regional authority, or environmental authority, board, or commission [to] develop and maintain either an Internet website or a webpage on the State's, municipality's, or county's Internet website . . . to provide increased public access to . . . operations and activities” N.J.S.A. 40:56A-4.1.

A reversal of the Council's past holdings that found referring requestors to records readily available on the Internet to be a violation of OPRA will not infringe on the statute's purpose of “maximiz[ing] public knowledge about public affairs in order to ensure an informed citizenry . . .” Mason v. City of Hoboken, 196 N.J. 51, 64 (2008) (*citing* Asbury Park Press v. Ocean Cnty. Prosecutor's Office, 374 N.J. Super. 312, 329 (Law. Div. 2004)). Directing a requestor to the specific location of a government record on the Internet will save government, and thus taxpayers, time and money, while also providing an efficient and expedient way for a requestor to easily obtain and examine the responsive record as required under OPRA. N.J.S.A. 47:1A-1.

[Id. at 3].

In the instant complaint, the Complainant requested the Board's minutes electronically via e-mail. The Custodian provided a timely response to the request via email, indicating that the responsive minutes, except for the May 2018 regular session and the executive sessions, could be found on the Board's website. The Custodian stated that the May 2018 regular session and the executive session minutes were under legal review. Moreover, the evidence of record reveals that the Complainant was able to access the records on the website.

Therefore, the Custodian has borne his burden of proving that he did not unreasonably deny access to the records responsive to the Complainant's October 10, 2018 request. N.J.S.A. 47:1A-6. Specifically, the Custodian directed the Complainant to the Board's website where the responsive records resided. See Rodriguez, GRC 2013-69.

The Custodian informed the Complainant in his October 18, 2018 response to the Complainant's October 10, 2018 request, that the responsive May 2018 regular session and executive session minutes were unavailable at the time of the request because they were under legal review. As such, the minutes were not yet approved. Thereafter in the November 8, 2018 SOI, the Custodian certified that the May 2018 regular session minutes are nonexistent because the prior Superintendent failed to complete those minutes.

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

The deliberative process privilege is a doctrine that permits government agencies to withhold documents that reflect advisory opinions, recommendations and deliberations submitted as part of a process by which governmental decisions and policies are formulated. NLRB v. Sears, Roebuck & Co., 421 U.S. 132 (1975). The New Jersey Supreme Court has ruled that a record that contains or involves factual components is entitled to deliberative-process protection under the exemption in OPRA when it was used in the decision-making process *and* its disclosure would reveal deliberations that occurred during that process. Educ. Law Ctr. v. N.J. Dep't of Educ., 198 N.J. 274 (2009).

The deliberative process privilege was discussed at length in In Re the Liquidation of Integrity Ins. Co., 165 N.J. 75, 88 (2000). There, the Court addressed the question of whether the Commissioner of Insurance could protect certain records from disclosure claimed to contain opinions, recommendations or advice regarding agency policy. Id. at 81. The Court adopted a qualified deliberative process privilege based upon the holding of McClain v. Coll. Hosp., 99 N.J. 346 (1985). Integrity, 165 N.J. at 88. In doing so, the Court noted that:

A document must meet two requirements for the deliberative process privilege to apply. First, it must have been generated before the adoption of an agency's policy or decision. In other words, it must be pre-decisional . . . Second, the document must be deliberative in nature, containing opinions, recommendations, or advice about agency policies . . . Once the government demonstrates that the subject materials meet those threshold requirements, the privilege comes into play. In

such circumstances, the government's interest in candor is the “preponderating policy” and, prior to considering specific questions of application, the balance is said to have been struck in favor of non-disclosure.

[Id. at 84-85 (citations omitted)].

The Council has repeatedly held that draft records of a public agency fall within the deliberative process privilege. In Dalesky v. Borough of Raritan (Somerset), GRC Complaint No. 2008-61 (November 2009), the Council, in upholding the custodian’s denial as lawful, determined that the requested record was a draft document and that draft documents in their entirety are ACD material pursuant to N.J.S.A. 47:1A-1.1. Subsequently, in Shea v. Vill. of Ridgewood (Bergen), GRC Complaint No. 2010-79 (February 2011), where the custodian certified that a requested letter was a draft that had not yet been reviewed by the municipal engineer, the Council concluded that the requested letter was exempt from disclosure under OPRA as ACD material.

Additionally, the GRC has previously ruled on the issue of whether draft meeting minutes are exempt from disclosure pursuant to OPRA. In Parave-Fogg v. Lower Alloways Creek Twp., GRC Complaint No. 2006-51 (August 2006), the Council held that “...the Custodian has not unlawfully denied access to the requested meeting minutes as the Custodian certifies that at the time of the request said minutes had not been approved by the governing body and as such, they constitute inter-agency, intra-agency advisory, consultative, or deliberative material and are exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1.”

Accordingly, the unapproved draft executive session minutes of the Board’s meetings from May 1, 2018 to October 10, 2018 constitute ACD material, and thus are exempt from access pursuant to N.J.S.A. 47:1A-1.1 and Parave-Fogg, GRC 2006-51. As such, the Custodian has lawfully denied access to said minutes. N.J.S.A. 47:1A-6.

With respect to the May 2018 regular session minutes, the Custodian certified in the SOI that they do not exist because the prior Superintendent failed to complete those minutes.

Therefore, the Custodian did not unlawfully deny access to the Complainant’s request for the May 2018 regular session minutes because the Custodian certified that such records do not exist because the prior Superintendent failed to complete those minutes, and the Complainant failed to submit any competent, credible evidence to refute the Custodian’s certification. See Pusterhofer, GRC 2005-49 (discussed *supra*).

The Complainant in his complaint, as well as his December 3, 2018 certification in response to the Custodian’s SOI, stated that various attachments referenced in the minutes responsive to his OPRA request were not included with the minutes. The Complainant stated that this is a violation of N.J.S.A. 10:4-14, which requires that reasonably comprehensive minutes be promptly available to the public.

In Katinsky v. River Vale Twp., GRC Complaint No. 2003-68 (November 2003), the complainant indicated to the GRC that the records provided to him by the custodian were "incomplete, improper and inaccurate." The custodian certified that copies of the requested documents given to the complainant were complete and correct. The Council determined that:

[t]he facts in this case indicate that the custodian provided the requester with the requested documents, and the custodian certified that they were complete, correct and contained no redactions. Therefore, the request in this case has been satisfied. The integrity of the requested documents is outside of the authority of the [Council]. For these reasons, the Council should dismiss the Complaint.

[Id.]

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

Accordingly, the Custodian did not unlawfully deny access to the requested regular session minutes of the Board's meetings from May 1, 2018 to October 10, 2018 based upon the sufficiency of the disclosed records' content. See Katinsky, GRC 2003-68. See also Kwanzaa, GRC 2004-167, citing N.J.S.A. 47:1A-7(b). Moreover, with respect to the Complainant's allegations that the Custodian violated N.J.S.A. 10:4-14, the GRC notes that the Council's jurisdiction does not extend to the provisions of N.J.S.A. 10:4-14.

### **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)).

Most troubling in the instant complaint is the fact that the Custodian received the Complainant's first OPRA request on October 4, 2018, and then on October 10, 2018, via *reply e-mail*, transmitted the agency's official OPRA request form to the Complainant and asked him to complete and return it. As such, the Custodian had to have seen the request. Thereafter, the Complainant did return the completed request form but the Custodian failed to address the request. Then on November 8, 2018, the Custodian certified in the SOI that the request was not seen by him and for that reason he did not address it. This averment, at the very least, is disingenuous.

In Gordon v. City of Orange (Essex), GRC Complaint No. 2013-255 (September 2014), the Council found that although the custodian failed to respond to the request in a timely manner, provide a specific legal basis for denying the requested records and prove that the denial of access to the requested records was authorized by law, that the custodian subsequently complied with the terms of the Council's Interim Order by disclosing responsive records to the complainant. As such, the Council determined that the custodian's actions did not rise to the level of a knowing and willful violation of OPRA and an unreasonable denial of access under the totality of the circumstances. Instructive here though, is that notwithstanding the fact that the custodian complied with the Council's Order by disclosing the responsive records, on appeal the court in Gordon v. City of Orange (Essex) Custodian of Record, 2017 N.J. Super. Unpub. LEXIS 1552, 2017 WL 2705438 (App. Div. 2017), reversed the Council's Final Decision, found that the City willfully and deliberately denied the complainant's request, and remanded this matter back to the GRC for the imposition of appropriate penalties.

Similarly, here, the Custodian may have willfully and deliberately denied the complainant's request. The Custodian had to have seen the Complainant's October 4, 2018 request based upon his October 10, 2018 reply e-mail seeking submission of the agency's official OPRA request form; however, despite the fact that the Complainant submitted a valid e-mail request on October 4, 2018, and duplicated it on an official OPRA request form on October 10, 2018 at the behest of the Custodian, the Custodian failed to respond to the Complainant's requests. At no time did the Custodian candidly admit to an error on his part, but rather, he certified that he did not address the request because ". . . this OPRA request was not seen and, thus, not responded to." Therefore, it is possible that the Custodian's actions were intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless, or unintentional. As such, this case should be referred to the Office of Administrative Law for determination 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. Because the evidence of record indicates that the written request submitted by the Complainant clearly invoked OPRA and sought specific identifiable government records, the Custodian's denial of access pending receipt of an official OPRA request form violated OPRA pursuant to N.J.S.A. 47:1A-5(g) and Renna v. County of Union, 407 N.J. Super. 230 (App. Div. 2009). See also Gatson v. Borough of Cliffside Park Police Dep't (Bergen), GRC Complaint No. 2009-239 (October 2010).
2. 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 immediately results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(e), N.J.S.A. 47:1A-5(g), and N.J.S.A. 47:1A-5(i). See Cody v. Middletown Twp. Public Schools, GRC Complaint No. 2005-98 (December 2005). See also Harris v. NJ Dep't of Corr., GRC Complaint No. 2011-65 (August 2012).
3. Notwithstanding the Custodian's "deemed" denial of the Complainant's October 4, 2018 request, the evidence of record reveals that on November 7, 2018, the Custodian disclosed to the Complainant copies of the contracts for the Superintendent and Business Administrator. Therefore, the Custodian granted access to said records. N.J.S.A. 47:1A-6. Further, the Custodian did not unlawfully deny access to the Complainant's request for copies of contracts for the Principal or Board Secretary because the Custodian certified that such records do not exist because the District does not employ a Principal or Board Secretary, and the Complainant failed to submit any competent, credible evidence to refute the Custodian's certification. See Pusterhofer v. NJ Dep't of Educ., GRC Complaint No. 2005-49 (July 2005).
4. The Custodian has borne his burden of proving that he did not unreasonably deny access to the records responsive to the Complainant's October 10, 2018 request. N.J.S.A. 47:1A-6. Specifically, the Custodian directed the Complainant to the Board's website where the responsive records resided. See Rodriguez v. Kean Univ., GRC Complaint No. 2013-69 (March 2014).
5. The unapproved draft executive session minutes of the Board's meetings from May 1, 2018 to October 10, 2018 constitute advisory, consultative or deliberative material, and thus are exempt from access pursuant to N.J.S.A. 47:1A-1.1 and Parave-Fogg v. Lower Alloways Creek Twp., GRC Complaint No. 2006-51 (August 2006). As such, the Custodian has lawfully denied access to said minutes. N.J.S.A. 47:1A-6.
6. The Custodian did not unlawfully deny access to the Complainant's request for the May 2018 regular session minutes because the Custodian certified that such records do not exist because the prior Superintendent failed to complete those minutes, and

the Complainant failed to submit any competent, credible evidence to refute the Custodian's certification. See Pusterhofer v. NJ Dep't of Educ., GRC Complaint No. 2005-49 (July 2005).

7. The Custodian did not unlawfully deny access to the requested regular session minutes of the Board's meetings from May 1, 2018 to October 10, 2018 based upon the sufficiency of the disclosed records' content. See Katinsky v. River Vale Twp., GRC Complaint No. 2003-68 (November 2003). See also Kwanzaa v. Dep't of Corr., GRC Complaint No. 2004-167 (March 2005), citing N.J.S.A. 47:1A-7(b). Moreover, with respect to the Complainant's allegations that the Custodian violated N.J.S.A. 10:4-14, the GRC notes that the Council's jurisdiction does not extend to the provisions of N.J.S.A. 10:4-14.
8. The Custodian may have willfully and deliberately denied the complainant's request. The Custodian had to have seen the Complainant's October 4, 2018 request based upon his October 10, 2018 reply e-mail seeking submission of the agency's official OPRA request form; however, despite the fact that the Complainant submitted a valid e-mail request on October 4, 2018, and duplicated it on an official OPRA request form on October 10, 2018 at the behest of the Custodian, the Custodian failed to respond to the Complainant's requests. At no time did the Custodian candidly admit to an error on his part, but rather, he certified that he did not address the request because ". . . this OPRA request was not seen and, thus, not responded to." Therefore, it is possible that the Custodian's actions were intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless, or unintentional. As such, this case should be referred to the Office of Administrative Law for determination of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Prepared By: John E. Stewart  
Staff Attorney

January 21, 2020<sup>6</sup>

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<sup>6</sup> This complaint was prepared for adjudication at the Council's January 28, 2020 meeting, but could not be adjudicated due to lack of quorum.