



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 29, 2021 Government Records Council Meeting**

James Pappas  
Complainant

Complaint No. 2019-229

v.

West Morris Regional High School District (Morris)  
Custodian of Record

At the June 29, 2021 public meeting, the Government Records Council (“Council”) considered the June 22, 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 Complainant has failed to establish in his request for reconsideration of the Council’s April 27, 2021 Final Decision that either 1) the Council’s decision is based upon a “palpably incorrect or irrational basis;” or 2) it is obvious that the Council did not consider the significance of probative, competent evidence. The Complainant failed to establish that the complaint should be reconsidered based on fraud or illegality. The Complainant has also failed to show that the Council acted arbitrarily, capriciously or unreasonably. Specifically, the Complainant failed to prove that the Council’s decision that no knowing and willful violation occurred was arbitrary or capricious. Thus, the Complainant’s request for reconsideration should be denied. Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996); D’Atria v. D’Atria, 242 N.J. Super. 392 (Ch. Div. 1990); In The Matter Of The Petition Of Comcast Cablevision Of S. Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Tel. Sys. In The City Of Atl. City, Cnty. Of Atl., State Of N.J., 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

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**

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

**James Pappas<sup>1</sup>**  
**Complainant**

**GRC Complaint No. 2019-229**

v.

**West Morris Regional High School District (Morris)<sup>2</sup>**  
**Custodial Agency**

**Records Relevant to Complaint:** Hard copies via pickup of “[a]ny and all records . . . include[ing] but not limited to files, documents, reports, notes, memos, e-mails, text messages, and electronic audio and video recordings” relating to the reporting of, and investigation into, a “Harassment, Intimidation, and Bullying” (“HIB”) complaint regarding F.P. from May 29, 2019 to present including “everything involving the HIB allegations . . . regardless of the final classification or outcome of the investigations into the allegations.”

**Custodian of Record:** L. Douglas Pechanec  
**Request Received by Custodian:** October 30, 2019  
**Response Made by Custodian:** November 8, 2019  
**GRC Complaint Received:** November 15, 2019

**Background**

**April 27, 2021 Council Meeting:**

At its April 27, 2021 public meeting, the Council considered the April 20, 2011 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, found that:

1. The Custodian complied with the Council’s February 23, 2021 Interim Order. Specifically, the Custodian responded in the extended time frame disclosing five (5) pages of responsive records without redactions, certifying that no recordings existed, and simultaneously providing certified confirmation of compliance to the Executive Director.
2. The Custodian unlawfully denied access to those responsive records that existed here. N.J.S.A. 47:1A-6; L.R. v. Camden City Pub. Sch. Dist., 452 N.J. Super. 56 (App. Div.

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

<sup>2</sup> Represented by Bradley D. Tishman, Esq., of Cleary, Giacobbe, Alfieri, Jacobs, LLC (Oakland, NJ).

2017). However, the Custodian lawfully denied access to the portion of the Complainant's invalid request seeking "any and all records" including "files, documents . . . memos, e-mails, text messages" and "everything involving" "Harassment, Intimidation, and Bullying" allegations filed on behalf of F.P. Also, the Custodian timely complied with the Council's February 23, 2021 Interim Order. 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.

#### Procedural History:

On April 29, 2021, the Council distributed its Final Decision to all parties. On April 30, 2021, the Complainant filed a request for reconsideration of the Council's Final Decision based on fraud and illegality. Therein, the Complainant requested that the Council reconsider its decision holding that the Custodian did not knowingly and willfully violate OPRA. The Complainant argued that the absence of "notes" in the Custodian's compliance response, which HIB requires to be kept, indicate the West Morris Regional High School District ("District") is "willfully and knowingly" withholding records. The Complainant further argued that the District unlawfully denied him access to his own child's records in retaliation for removing his child from the District and questioning their handling of the HIB investigation. The Complainant argued that this "game playing" represented a "positive element of conscious wrongdoing and was intentional and deliberate." The Complainant noted that the compliance certification acknowledging a prior disclosure further supports his position that the District's actions were deliberate.

On April 30, 2021, Custodian's Counsel sought an extension of time to submit objections to the Complainant's request for reconsideration, which the Government Records Council ("GRC") granted through May 21, 2021. On May 20, 2021, Custodian's Counsel submitted objections to the request for reconsideration. Therein, Counsel argued that the request for reconsideration should be denied because the Complainant repeated prior arguments and merely expressed his dissatisfaction with the Council's decision. Gordon v. City of Orange (Essex), GRC Complaint No. 2011-336, *et seq.* (May 2013). Counsel further contended that contrary to the Complainant's assertions, the disclosed records contained "notes" and there is no basis for revisiting the Council's Final Decision. Counsel also argued that the Complainant provided no evidence to support that the knowing and willful issue should be reconsidered. Counsel finally contended that the Complainant's allegations of retaliation are erroneous; he ignored that the most of the subject OPRA request was invalid and that the District promptly disclosed records when ordered by the Council.<sup>3</sup> Counsel thus contended that the Complainant's request for

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<sup>3</sup> The Custodian also argued that the District was not required to disclose records that the Complainant already possessed prior to submitting his OPRA request. Bart v. City of Paterson Hous. Auth., 403 N.J. Super. 609 (App. Div. 2008). This argument was likely in response to the Complainant's assertion in an April 27, 2020 e-mail to the GRC wherein he alleged that the District failed to disclose him e-mails. However, the Complainant did not include this argument in his actual request for reconsideration. Notwithstanding, precedential case law, including Bart, 403 N.J. Super. 609, support that a custodian is not required to disclose records already in the requestor's possession at the time they submit an OPR request. See also Caggiano v. N.J. Office of the Governor, GRC Complaint No. 2014-408 (September 2015).

reconsideration should be denied because it failed to meet the criteria necessary for granting such an application.

## Analysis

### Reconsideration

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

In the matter before the Council, the Complainant filed the request for reconsideration of the Council's April 27, 2021 Final Decision on April 30, 2021, one (1) day after the issuance of the same.

Applicable case law holds that:

“A party should not seek reconsideration merely based upon dissatisfaction with a decision.” D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990). Rather, reconsideration is reserved for those cases where (1) the decision is based upon a “palpably incorrect or irrational basis;” or (2) it is obvious that the finder of fact did not consider, or failed to appreciate, the significance of probative, competent evidence. *E.g.*, Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996). The moving party must show that the court acted in an arbitrary, capricious or unreasonable manner. D'Atria, . . . 242 N.J. Super. at 401. “Although it is an overstatement to say that a decision is not arbitrary, capricious, or unreasonable whenever a court can review the reasons stated for the decision without a loud guffaw or involuntary gasp, it is not much of an overstatement.” Ibid.

[In The Matter Of The Petition Of Comcast Cablevision Of S. Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Tel. Sys. In The City Of Atl. City, Cnty. Of Atl., State Of N.J., 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).]

Upon review of the parties' filings, the Complainant's request for reconsideration should be denied. As was the case in Gordon, GRC 2011-336, the Complainant's filing voices his displeasure that the GRC did not find a knowing and willful violation without supporting that the basis for the decision was arbitrary or capricious. Instead, the Council clearly set forth the reasons for reaching said conclusion that encompassed the totality of the circumstances.

However, it should be noted that the evidence of record supports the presence of “notes” in the records disclosed by the Custodian on March 8, 2021. Also, that the District denied the Complainant access to his own child's student records under OPRA is not proof of a retaliation

attempt amounting to a knowing and willful violation. In fact, the exact issue of student records disclosure under OPRA was addressed by both New Jersey's Supreme Court and the GRC during the pendency of this complaint. See L.R. v. Camden City Pub. Sch. Dist., 238 N.J. 547 (2019); Epstein, Esq. (O.B.O. C.B.) v. Hopewell Crest Bd. of Educ. (Cumberland), GRC Complaint No. 2018-257 (Interim Order dated July 28, 2020).

As the moving party, the Complainant was required to establish either of the necessary criteria set forth above: either 1) the Council's decision is based upon a "palpably incorrect or irrational basis;" or 2) it is obvious that the Council did not consider the significance of probative, competent evidence. See Cummings, 295 N.J. Super. at 384. The Complainant failed to establish that the complaint should be reconsidered based on fraud or illegality. The Complainant has also failed to show that the Council acted arbitrarily, capriciously or unreasonably. See D'Atria, 242 N.J. Super. at 401. Specifically, the Complainant failed to prove that the Council's decision that no knowing and willful violation occurred was arbitrary or capricious. Thus, the Complainant's request for reconsideration should be denied. Cummings, 295 N.J. Super. at 384; D'Atria, 242 N.J. Super. at 401; Comcast, 2003 N.J. PUC at 5-6.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that the Complainant has failed to establish in his request for reconsideration of the Council's April 27, 2021 Final Decision that either 1) the Council's decision is based upon a "palpably incorrect or irrational basis;" or 2) it is obvious that the Council did not consider the significance of probative, competent evidence. The Complainant failed to establish that the complaint should be reconsidered based on fraud or illegality. The Complainant has also failed to show that the Council acted arbitrarily, capriciously or unreasonably. Specifically, the Complainant failed to prove that the Council's decision that no knowing and willful violation occurred was arbitrary or capricious. Thus, the Complainant's request for reconsideration should be denied. Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996); D'Atria v. D'Atria, 242 N.J. Super. 392 (Ch. Div. 1990); In The Matter Of The Petition Of Comcast Cablevision Of S. Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Tel. Sys. In The City Of Atl. City, Cnty. Of Atl., State Of N.J., 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

Prepared By: Frank F. Caruso  
Executive Director

June 22, 2021



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

**April 27, 2021 Government Records Council Meeting**

James Pappas  
Complainant

Complaint No. 2019-229

v.

West Morris Regional High School District (Morris)  
Custodian of Record

At the April 27, 2021 public meeting, the Government Records Council (“Council”) considered the April 20, 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:

1. The Custodian complied with the Council’s February 23, 2021 Interim Order. Specifically, the Custodian responded in the extended time frame disclosing five (5) pages of responsive records without redactions, certifying that no recordings existed, and simultaneously providing certified confirmation of compliance to the Executive Director.
2. The Custodian unlawfully denied access to those responsive records that existed here. N.J.S.A. 47:1A-6; L.R. v. Camden City Pub. Sch. Dist., 452 N.J. Super. 56 (App. Div. 2017). However, the Custodian lawfully denied access to the portion of the Complainant’s invalid request seeking “any and all records” including “files, documents . . . memos, e-mails, text messages” and “everything involving” “Harassment, Intimidation, and Bullying” allegations filed on behalf of F.P. Also, the Custodian timely complied with the Council’s February 23, 2021 Interim Order. 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 27<sup>th</sup> Day of April 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: April 29, 2021**



**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director  
April 27, 2021 Council Meeting**

**James Pappas<sup>1</sup>  
Complainant**

**GRC Complaint No. 2019-229**

v.

**West Morris Regional High School District (Morris)<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** Hard copies via pickup of “[a]ny and all records . . . include[ing] but not limited to files, documents, reports, notes, memos, e-mails, text messages, and electronic audio and video recordings” relating to the reporting of, and investigation into, a “Harassment, Intimidation, and Bullying” (“HIB”) complaint regarding F.P. from May 29, 2019 to present including “everything involving the HIB allegations . . . regardless of the final classification or outcome of the investigations into the allegations.”

**Custodian of Record:** L. Douglas Pechanec  
**Request Received by Custodian:** October 30, 2019  
**Response Made by Custodian:** November 8, 2019  
**GRC Complaint Received:** November 15, 2019

**Background**

**February 23, 2021 Council Meeting:**

At its February 23, 2021 public meeting, the Council considered the February 16, 2021 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. The portion of the Complainant’s request seeking “any and all records” including “files, documents . . . memos, e-mails, text messages” and “everything involving” “Harassment, Intimidation, and Bullying” allegations filed on behalf of F.P. is invalid because it failed to identify a specific record or include the required criteria. MAG Entm’t, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005); Bent v. Stafford Police Dep’t, 381 N.J. Super. 30, 37 (App. Div. 2005); N.J. Builders Ass’n v. N.J. Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009); Feiler-Jampel v. Somerset Cnty. Prosecutor’s Office, GRC Complaint No. 2007-190 (Interim

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

<sup>2</sup> Represented by Bradley D. Tishman, Esq., of Cleary, Giacobbe, Alfieri, Jacobs, LLC (Oakland, NJ).

Order dated March 26, 2008); Lewis-Gallagher v. Monroe Twp. Pub. Sch. Dist. (Gloucester), GRC Complaint No. 2018-8 (September 2019). Thus, the Custodian lawfully denied access to this portion of the request. N.J.S.A. 47:1A-6.

2. As a threshold matter, the Custodian unlawfully denied access to the Complainant's OPRA request seeking "reports, notes . . . and electronic audio and video recordings." N.J.S.A. 47:1A-6. Specifically, the Complainant qualified as an excepted person under N.J.A.C. 6A:32-7.5(e)(1) and was thus entitled to receipt of F.P.'s student records. L.R. v. Camden City Pub. Sch. Dist., 452 N.J. Super. 56 (App. Div. 2017).
3. The Custodian may have unlawfully denied access to "reports, notes . . . and electronic audio and video recordings." N.J.S.A. 47:1A-6. The Custodian must thus search for and locate those responsive reports, notes, and recordings related to the "Harassment, Intimidation, and Bullying" allegations from May 10, 2019 through the date of the OPRA request. If no records exist, the Custodian must certify to this fact inclusive of a detailed explanation of the search conducted.
4. **The Custodian shall comply with conclusion No. 3 above within five (5) business days from receipt of the Council's Interim Order. Further, the Custodian shall simultaneously deliver<sup>3</sup> certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,<sup>4</sup> to the Executive Director.<sup>5</sup>**
5. Should the Custodian locate responsive records, he must provide unredacted copies of them to the Council for *in camera* review to determine the validity of the Custodian's assertion that the e-mails were exempt under the "inter-agency or intra-agency advisory, consultative, or deliberative material" exemption under OPRA. N.J.S.A. 47:1A-1.1; See Paff v. N.J. Dep't of Labor, Bd. of Review, 379 N.J. Super. 346, 355 (App. Div. 2005). The GRC notes that this conclusion is not applicable if the Custodian certifies that no records exist.
6. **The Custodian shall deliver<sup>6</sup> to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see conclusion No. 5 above), nine (9) copies of the redacted records, a document or redaction index<sup>7</sup>, as well as a legal certification from the Custodian, in accordance with R. 1:4-4, that the records**

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<sup>3</sup> 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.

<sup>4</sup> "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

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

<sup>6</sup> 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.

<sup>7</sup> The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

**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.**

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

#### Procedural History:

On February 24, 2021, the Council distributed its Interim Order to all parties. On March 1, 2021, Custodian's Counsel e-mailed the Government Records Council ("GRC") seeking an extension of time through March 10, 2021 to respond to the Council's Order.<sup>8</sup> On March 3, 2021, the GRC responded granting the requested extension.

On March 8, 2021, the Custodian responded to the Council's Interim Order. Therein, the Custodian responded that upon receipt of the Council's Order, Director of Special Education and Anti-Bullying Coordinator Michael Reinknecht reviewed the West Morris Regional High School District's ("District") files. The Custodian certified that said review produced five (5) pages of records responsive to the subject OPRA request. The Custodian affirmed that Mr. Reinknecht confirmed that no recordings existed. The Custodian noted that the Complainant and District were parties in J.P. and S.P. O.B.O. F.P. v. West Morris Reg'l High Sch. Dist., OAL Docket No. EDU-16266-19 and that the five (5) pages were released to the Complainant without redactions as part of that litigation. The Custodian thus certified that the District was disclosing the records without redaction because the Complainant likely already possessed them.

#### Analysis

##### Compliance

At its February 23, 2021 meeting, the Council ordered the Custodian to search for and locate responsive "reports, notes . . . and electronic audio and video recordings" or certify if none exist. The Council further ordered that should the Custodian locate responsive records, he shall provide them to the GRC for an *in camera* review to determine the validity of the Custodian's denial. Finally, the Council ordered the Custodian to submit certified confirmation of compliance, in accordance with R. 1:4-4, to the Executive Director. On February 24, 2021, 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 March 3, 2021.

On March 1, 2021, the third (3<sup>rd</sup>) business day after receipt of the Council's Order, Custodian's Counsel sought, and was granted, an extension of time to respond through March 10, 2021. On March 8, 2021, the Custodian responded to the Council's Interim Order certifying that the District located five (5) pages of responsive records and no recordings. The Custodian further

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<sup>8</sup> The Complainant objected to the extension request in an e-mail to the GRC on March 2, 2021.

certified that those located records were being disclosed to the Complainant without redactions<sup>9</sup> because he was likely already in possession of them as part of J.P., OAL Docket No. EDU-16266-19.

Upon review of the Council's Order and the Custodian's response, the GRC is satisfied that compliance has been met here. Specifically, the Custodian searched for and located responsive records. As part of his response, the Custodian disclosed those records to the Complainant without redactions, thus negating the need for the GRC to perform an *in camera* review. Additionally, the Custodian certified that no recordings existed. Finally, the Custodian timely responded within the extended time frame providing certified confirmation of compliance.

Therefore, the Custodian complied with the Council's February 23, 2021 Interim Order. Specifically, the Custodian responded in the extended time frame disclosing five (5) pages of responsive records without redactions, certifying that no recordings existed, and simultaneously providing certified confirmation of compliance to the Executive Director.

### **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)).

In the matter before the Council, the Custodian unlawfully denied access to those responsive records that existed here. N.J.S.A. 47:1A-6; L.R., 452 N.J. Super. 56. However, the Custodian lawfully denied access to the portion of the Complainant's invalid request seeking “any

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<sup>9</sup> The GRC notes that the records disclosed contain the names of other students. The Council has previously held that an excepted party may receive access to “student records” with redactions for other student identifiers. See i.e. Martinez v. Edison Bd. of Educ. (Middlesex), GRC Complaint No. 2014-126 (May 2015).

and all records” including “files, documents . . . memos, e-mails, text messages” and “everything involving” “[HIB]” allegations filed on behalf of F.P. Also, the Custodian timely complied with the Council’s February 23, 2021 Interim Order. 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 Executive Director respectfully recommends the Council find that:

1. The Custodian complied with the Council’s February 23, 2021 Interim Order. Specifically, the Custodian responded in the extended time frame disclosing five (5) pages of responsive records without redactions, certifying that no recordings existed, and simultaneously providing certified confirmation of compliance to the Executive Director.
  
2. The Custodian unlawfully denied access to those responsive records that existed here. N.J.S.A. 47:1A-6; L.R. v. Camden City Pub. Sch. Dist., 452 N.J. Super. 56 (App. Div. 2017). However, the Custodian lawfully denied access to the portion of the Complainant’s invalid request seeking “any and all records” including “files, documents . . . memos, e-mails, text messages” and “everything involving” “Harassment, Intimidation, and Bullying” allegations filed on behalf of F.P. Also, the Custodian timely complied with the Council’s February 23, 2021 Interim Order. 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: Frank F. Caruso  
Executive Director

April 20, 2021



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 23, 2021 Government Records Council Meeting**

James Pappas  
Complainant

Complaint No. 2019-229

v.

West Morris Regional High School District (Morris)  
Custodian of Record

At the February 23, 2021 public meeting, the Government Records Council (“Council”) considered the February 16, 2021 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 portion of the Complainant’s request seeking “any and all records” including “files, documents . . . memos, e-mails, text messages” and “everything involving” “Harassment, Intimidation, and Bullying” allegations filed on behalf of F.P. is invalid because it failed to identify a specific record or include the required criteria. MAG Entm’t, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005); Bent v. Stafford Police Dep’t, 381 N.J. Super. 30, 37 (App. Div. 2005); N.J. Builders Ass’n v. N.J. Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009); Feiler-Jampel v. Somerset Cnty. Prosecutor’s Office, GRC Complaint No. 2007-190 (Interim Order dated March 26, 2008); Lewis-Gallagher v. Monroe Twp. Pub. Sch. Dist. (Gloucester), GRC Complaint No. 2018-8 (September 2019). Thus, the Custodian lawfully denied access to this portion of the request. N.J.S.A. 47:1A-6.
2. As a threshold matter, the Custodian unlawfully denied access to the Complainant’s OPRA request seeking “reports, notes . . . and electronic audio and video recordings.” N.J.S.A. 47:1A-6. Specifically, the Complainant qualified as an excepted person under N.J.A.C. 6A:32-7.5(e)(1) and was thus entitled to receipt of F.P.’s student records. L.R. v. Camden City Pub. Sch. Dist., 452 N.J. Super. 56 (App. Div. 2017).
3. The Custodian may have unlawfully denied access to “reports, notes . . . and electronic audio and video recordings.” N.J.S.A. 47:1A-6. The Custodian must thus search for and locate those responsive reports, notes, and recordings related to the “Harassment, Intimidation, and Bullying” allegations from May 10, 2019 through the date of the OPRA request. If no records exist, the Custodian must certify to this fact inclusive of a detailed explanation of the search conducted.



4. **The Custodian shall comply with conclusion No. 3 above within five (5) business days from receipt of the Council's Interim Order. Further, the Custodian shall simultaneously deliver<sup>1</sup> certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,<sup>2</sup> to the Executive Director.<sup>3</sup>**
5. Should the Custodian locate responsive records, he must provide unredacted copies of them to the Council for *in camera* review to determine the validity of the Custodian's assertion that the e-mails were exempt under the "inter-agency or intra-agency advisory, consultative, or deliberative material" exemption under OPRA. N.J.S.A. 47:1A-1.1; See Paff v. N.J. Dep't of Labor, Bd. of Review, 379 N.J. Super. 346, 355 (App. Div. 2005). The GRC notes that this conclusion is not applicable if the Custodian certifies that no records exist.
6. **The Custodian shall deliver<sup>4</sup> to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see conclusion No. 5 above), nine (9) copies of the redacted records, a document or redaction index<sup>5</sup>, as well as a legal certification from the Custodian, in accordance with R. 1:4-4, 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.**
7. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Interim Order Rendered by the  
Government Records Council  
On The 23<sup>rd</sup> Day of February 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: February 24, 2021**

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<sup>1</sup> 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.

<sup>2</sup> "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

<sup>3</sup> Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

<sup>4</sup> 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.

<sup>5</sup> The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
February 23, 2021 Council Meeting**

**James Pappas<sup>1</sup>  
Complainant**

**GRC Complaint No. 2019-229**

v.

**West Morris Regional High School District (Morris)<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** Hard copies via pickup of “[a]ny and all records . . . include[ing] but not limited to files, documents, reports, notes, memos, e-mails, text messages, and electronic audio and video recordings” relating to the reporting of, and investigation into, a “Harassment, Intimidation, and Bullying” (“HIB”) complaint regarding F.P. from May 29, 2019 to present including “everything involving the HIB allegations . . . regardless of the final classification or outcome of the investigations into the allegations.”

**Custodian of Record:** L. Douglas Pechanec  
**Request Received by Custodian:** October 30, 2019  
**Response Made by Custodian:** November 8, 2019  
**GRC Complaint Received:** November 15, 2019

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

**Request and Response:**

On October 30, 2019, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On November 8, 2019, the Custodian responded in writing first denying the subject OPRA request as invalid because it required research to locate all records regarding the HIB complaint. MAG Entm’t, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005); Bent v. Stafford Police Dep’t, 381 N.J. Super. 30, 37 (App. Div. 2005); N.J. Builders Ass’n v. N.J. Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007); Lagerkvist v. Office of the Governor, 443 N.J. Super. 230, 237 (App. Div. 2015). The Custodian next denied the subject OPRA request under the Family Rights and Privacy Act (“FERPA”) and New Jersey Pupil Records Act (“NJPR”) because he was prohibited from disclosing “student records” without consent from a parent, guardian, or adult student. 20 U.S.C. 1232(g); N.J.A.C. 6A:32-7.5. The Custodian finally denied access to the subject OPRA

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

<sup>2</sup> Represented by Bradley D. Tishman, Esq., of Cleary, Giacobbe, Alfieri, Jacobs, LLC (Oakland, 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 under the “inter-agency or intra-agency advisory, consultative, or deliberative [(“ACD”)] material” exemption. N.J.S.A. 47:1A-1.1; Roykovich v. West Milford Bd. of Educ. (Passaic), GRC Complaint No. 2011-258 (April 2013). The Custodian stated that any documents prepared by the West Morris Regional High School District’s (“District”) guidance counsellors and staff members were exempt under the forgoing exemption.

#### Denial of Access Complaint:

On November 15, 2019, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that the Custodian unlawfully denied him access to the records sought. The Complainant contended that no exemption in OPRA allowed the Custodian to deny a request as “overbroad.” The Complainant further argued that the Custodian applied FERPA and the NJPRA in error; he and his wife filed the HIB complaint on behalf of F.P., their daughter, and identified the accused parties. The Complainant argued that he believed the District was denying access in bad faith because they failed to conduct a proper HIB investigation. The Complainant noted that he is only seeking access to records pertaining to F.P. and understands if any other personally identifying information is redacted.

#### Statement of Information:

On November 26, 2019, the Custodian filed a Statement of Information (“SOF”). The Custodian certified that he received the Complainant’s OPRA request on October 30, 2019. The Custodian affirmed that he did not perform a search because the Complainant’s OPRA request was invalid. The Custodian certified that he responded in writing on November 8, 2019 denying the subject OPRA request on several bases.

The Custodian first argued that the Complainant’s OPRA request was invalid because it failed to identify specific records with reasonable clarity. MAG, 375 N.J. Super. 534 The Custodian argued that OPRA did not require him to conduct research. See Lagerkvist, 443 N.J. Super. at 237. The Custodian argued that the Complainant request would have required him to conduct research to locate records pertaining to the referenced HIB allegations. The Custodian argued that his position is supported by the Complainant’s want for “everything involving HIB allegations made on behalf of . . .” F.P.

The Custodian next argued that notwithstanding the invalid nature of the OPRA request, any responsive records would have been exempt from disclosure under multiple exemptions. The Custodian argued that Federal and State laws prohibit the District from disclosing “student records” and any identifying personal information without consent from certain parties. 20 U.S.C. 1232(g); N.J.A.C.6A:32-7.5. The Custodian further argued that any records prepared by the District’s staff about the HIB allegations would be considered ACD material under N.J.S.A. 47:1A-1.1. See Roykovich, GRC 2011-258.

## Analysis

### Validity of Request

The New Jersey Appellate Division has held that:

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

[MAG, 375 N.J. Super. at 546 (emphasis added).]

The court reasoned that:

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

[Id. at 549 (emphasis added).]

The court further held that “[u]nder OPRA, *agencies are required to disclose only ‘identifiable’ government records* not otherwise exempt . . . In short, OPRA does not countenance open-ended searches of an agency's files.” Id. (emphasis added). Bent, 381 N.J. Super. at 37;<sup>4</sup> N.J. Builders, 390 N.J. Super. at 180; Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).

The validity of an OPRA request typically falls into three (3) categories. The first is a request that is overly broad (“any and all,” requests seeking “records” generically, *etc.*) and requires a custodian to conduct research. MAG, 375 N.J. Super. 534; Donato v. Twp. of Union, GRC Complaint No. 2005-182 (January 2007). The second is those requests seeking information or asking questions. See e.g. Rummel v. Cumberland Cnty. Bd. of Chosen Freeholders, GRC Complaint No. 2011-168 (December 2012). The final category is a request that is either not on an official OPRA request form or does not invoke OPRA. See e.g. Naples v. N.J. Motor Vehicle Comm’n, GRC Complaint No. 2008-97 (December 2008).

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<sup>4</sup> Affirmed on appeal regarding Bent v. Stafford Police Dep’t, GRC Case No. 2004-78 (October 2004).

Regarding generic requests for “records,” the request at issue in MAG sought “all documents or records evidencing that the ABC sought, obtained or ordered revocation of a liquor license for the charge of selling alcoholic beverages to an intoxicated person in which such person, after leaving the licensed premises, was involved in a fatal auto accident” and “all documents or records evidencing that the ABC sought, obtained or ordered suspension of a liquor license exceeding 45 days for charges of lewd or immoral activity.” Id. at 539-540. The court noted that plaintiffs failed to include additional identifiers such as a case name or docket number. See also Steinhauer-Kula v. Twp. of Downe (Cumberland), GRC Complaint No. 2010-198 (March 2012) (holding that the complainant’s request item No. 2 seeking “[p]roof of submission” was invalid); Edwards v. Hous. Auth. of Plainfield (Union), GRC Complaint No. 2008-183 *et seq.* (Final Decision dated April 25, 2012) (accepting the Administrative Law Judge’s finding that a newspaper article attached to a subject OPRA request that was related to the records sought did not cure the deficiencies present in the request) Id. at 12-13.

Moreover, in Feiler-Jampel v. Somerset Cnty. Prosecutor’s Office, GRC Complaint No. 2007-190 (Interim Order dated March 26, 2008), the Council similarly held that a request seeking “[a]ny and all documents and evidence” relating to an investigation being conducted by the Somerset County Prosecutor’s Office was invalid, reasoning that:

[B]ecause the records requested comprise an entire SCPO file, the request is overbroad and of the nature of a blanket request for a class of various documents rather than a request for specific government records. Because OPRA does not require custodians to research files to discern which records may be responsive to a request, the Custodian had no legal duty to research the SCPO files to locate records potentially responsive to the Complainant’s request pursuant to the Superior Court’s decisions in [MAG], [Bent] and the Council’s decisions in Asarnow v. Department of Labor and Workforce Development, GRC Complaint No. 2006-24 (May 2006) and Morgano v. Essex Cnty. Prosecutor’s Office, GRC Complaint No. 2007-190 (February 2008).

[Id. See also Schulz v. N.J. State Police, GRC Complaint No. 2014-390 (Interim Order dated July 28, 2015) (holding that the portion of the request seeking “all documents” was overly broad and thus invalid).]

Additionally, in Lagerkvist, 443 N.J. Super. 230, the court held that plaintiff’s request was invalid because it required research. In reaching this conclusion, the court reasoned that:

The custodian in this case would have had to make a preliminary determination as to which travel records correlated to the governor and to his senior officials, past and present, over a span of years. The custodian would then have had to attempt to single out those which were third-party funded events. Next, he would have had to collect all documents corresponding to those events and search to ensure he had accumulated everything, including both paper and electronic correspondence. OPRA does not convert a custodian into a researcher.

[Id. at 237.]

Regarding requests for communications, including e-mails, text messages, and other written correspondence, the GRC has established criteria deemed necessary under OPRA to request them. In Elcavage v. West Milford Twp. (Passaic), GRC Complaint No. 2009-07 (April 2010), the Council determined that to be valid, such requests must contain: (1) the content and/or subject of the e-mail, (2) the specific date or range of dates during which the e-mail(s) were transmitted, and (3) the identity of the sender and/or the recipient thereof. See also Sandoval v. N.J. State Parole Bd., GRC Complaint No. 2006-167 (Interim Order March 28, 2007). The Council has also applied the criteria set forth in Elcavage to other forms of correspondence, such as letters. See Armenti v. Robbinsville Bd. of Educ. (Mercer), GRC Complaint No. 2009-154 (Interim Order May 24, 2011). The GRC notes that the Council has determined that requests seeking correspondence but omitting senders and/or recipients are invalid. See Lewis-Gallagher v. Monroe Twp. Pub. Sch. Dist. (Gloucester), GRC Complaint No. 2018-8 (September 2019).

Here, a portion of the Complainant's request sought "any and all records" including "files, documents . . . memos, e-mails, text messages" and "everything involving" HIB allegations filed on behalf of F.P. The Custodian responded denying access to the request because, among other reasons, it was invalid. In the Denial of Access Complaint, the Complainant argued that OPRA did not support the Custodian's validity denial and that the District was acting in bad faith. In the SOI, the Custodian reiterated that he lawfully denied access to the Complainant's request because it was invalid.

Upon review, the portion of the Complainant's request seeking "any and all records" to include "files, documents" and "everything involving" the HIB complaint is clearly invalid. Contrary to the Complainant's argument that OPRA does not contain an exemption for invalid requests, MAG and its progeny support this conclusion. Additionally, the portion of the request seeking communications ("memos, e-mails, [and] text messages") is also invalid because it failed to include any identification of senders/recipients. See Lewis-Gallagher, GRC 2018-8.

Accordingly, the portion of the Complainant's request seeking "any and all records" including "files, documents . . . memos, e-mails, text messages" and "everything involving" HIB allegations filed on behalf of F.P. is invalid because it failed to identify a specific record or include the required criteria. MAG, 375 N.J. Super. at 546; Bent, 381 N.J. Super. at 37; N.J. Builders, 390 N.J. Super. at 180; Schuler, GRC 2007-151; Feiler-Jampel, GRC 2007-190; Lewis-Gallagher, GRC 2018-8. Thus, the Custodian lawfully denied access to this portion of the request. N.J.S.A. 47:1A-6.

### **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.

Having found that a portion of the Complainant’s OPRA request is invalid, the GRC now turns towards the remainder of the request seeking “reports, notes . . . and electronic audio and video recordings.”

### “Student Records” Exemptions

As a threshold issue for the remaining OPRA request items, the GRC addresses whether the Complainant has standing to access records regarding his daughter under OPRA.

OPRA also provides that:

The provisions of [OPRA] shall not abrogate any exemption of a public record or government record from public access heretofore made pursuant to [OPRA]; any other statute; resolution of either or both Houses of the Legislature; regulation promulgated under the authority of any statute or Executive Order of the Governor; Executive Order of the Governor; Rules of Court; any federal law; federal regulation; or federal order.

[N.J.S.A. 47:1A-9(a).]

The regulations of the State Board of Education and the Commissioner define a “student record” as “. . . information related to an individual student *gathered within or outside the school district and maintained within the school district*, regardless of the physical form in which it is maintained.” N.J.A.C. 6A:32-2.1 (emphasis added). The regulations of the State Board of Education and the Commissioner of Education provide that “[o]nly authorized organizations, agencies or persons as defined herein shall have access to student records . . .” to include “persons from outside the school if they have written consent of the parent . . .” N.J.A.C. 6A:32-7.5(e)(14). Finally, the regulations require that “[i]n complying with this section, individuals shall adhere to requirements pursuant to [OPRA] and [FERPA].” N.J.A.C. 6A:32-7.5(g). To this end, the Council has looked to these exceptions in determining whether a complainant can access “student records” in part or whole under OPRA. See *i.e.* Martinez v. Edison Bd. of Educ. (Middlesex), GRC Complaint No. 2014-126 (May 2015); but see Inzelbuch v. Lakewood Bd. of Educ. (Ocean), GRC Complaint No. 2014-92 (September 2014).

More recently, the Appellate Division addressed OPRA and the disclosure of “student records” in L.R. v. Camden City Pub. Sch. Dist., 452 N.J. Super. 56 (App. Div. 2017). In one of the four (4) consolidated cases, the trial court ordered the school district to disclose student records requested under OPRA, with redactions made to all personally identifying information (“PII”). The Appellate Division held that redacting PII from a document does not remove its classification as a “student record.” Id. at 83. The court found that “N.J.A.C. 6A:32-7.5(g)’s does not expressly incorporate FERPA’s provisions for the redaction of PII into the [New Jersey Pupil Records Act (“NJPR”) or its regulations. Moreover, nothing in the NJPRA or its regulations states that sufficiently anonymized documents, with all PII removed, are no longer “student records” under N.J.A.C. 6A:32-1.” Id. at 85. See also Doe v. Rutgers, State Univ. of N.J., 2021 N.J. Super. LEXIS 4 (App. Div. 2021) (Approved for Publication).

The court further discussed the interplay between the NJPRA, FERPA and OPRA:

It is reasonable to conclude that N.J.A.C. 6A:32-7.5(g) centrally concerns functionality—a district's *processing* of student record requests from an authorized person or organization. See K.L., supra, 423 N.J. Super. at 350, 32 A.3d 1136 (“In providing access to school records in accordance with N.J.A.C. 6A:32-7.5, school districts must also comply with the requirements of OPRA and FERPA, N.J.A.C. 6A:32-7.5(g).”). For instance, if a school district receives an OPRA request from an authorized person or organization listed under N.J.A.C. 6A:32-7.5(e), then it must process that request in compliance with OPRA and FERPA requirements. Nothing in the plain language of N.J.A.C. 6A:32-7.5(g), however, supersedes or nullifies the limitations of “authorized” parties, as set forth at N.J.A.C. 6A:32-7.5(a) and (e). Hence, we agree with the judge in the Hillsborough case that a requestor cannot gain access to a student record unless the requestor satisfies one of the “[a]uthorized” categories listed in N.J.A.C. 6A:32-7.5(e)(1) through (16).

[Id. at 86-87 (emphasis in original).]<sup>5</sup>

In the matter before the Council, the Complainant submitted his OPRA request for certain records regarding his own daughter. Notwithstanding, the Custodian denied access to the OPRA request under FERPA and the NJPRA. This complaint ensued, wherein the Complainant argued that he sought access to records regarding his own child. In the SOI, the Custodian maintained the position that any responsive records would be exempt under FERPA and the NJPRA.

However, the Appellate Division was clear that the existence of other statutes regarding the management and disclosability of student records does not infringe on an individual’s right to submit a request under OPRA. In fact, DOE’s regulations expressly provide such an option by requiring districts to adhere to OPRA and FERPA. N.J.A.C. 6A:32-7.5(g); L.R., 452 N.J. Super. at 87. Based on this, the Complainant here has standing to access his own child’s student record based on the plain reading of OPRA, DOE’s regulations, and L.R., 238 N.J. 547.

Accordingly, as a threshold matter, the Custodian unlawfully denied access to the Complainant’s OPRA request seeking “reports, notes . . . and electronic audio and video recordings.” N.J.S.A. 47:1A-6. Specifically, the Complainant qualified as an excepted person under N.J.A.C. 6A:32-7.5(e)(1) and was thus entitled to receipt of F.P.’s student records. L.R., 452 N.J. Super. at 86-87.

#### “Reports, Notes, and Recordings”

The GRC now addresses the types of records identified by the Complainant that are part of the valid portion of the OPRA request.

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<sup>5</sup> The Supreme Court of New Jersey subsequently affirmed by equal division noting that “N.J.A.C. 6A:32-7.5(g) confirms that individuals and entities may request student records in accordance with OPRA’s provisions, and that educational agencies must comply with those provisions when they respond to such requests.” L.R. v. Camden City Pub. Sch. Dist., 238 N.J. 547, 569 (2019).

Regarding the “reports” version of the OPRA request, in Roykovich, GRC 2011-258, the custodian denied access to a responsive HIB report under the ACD exemption. The Council subsequently ordered an *in camera* review of the report and determined that the custodian lawfully denied access to it. In reaching that determination, the Council found that the report contained factual information and opinions relied upon by the agency to make a personnel decision. Id. at 14 (citing Educ. Law Ctr. v. N.J. Dep’t of Educ., 198 N.J. 274 (2009)).

Regarding the “notes” portion of the request, in O’Shea v. West Milford Bd. of Educ., 391 N.J. Super. 534, 538 (App. Div. 2007), the Appellate Division stated that handwritten notes of a meeting were exempt from disclosure as ACD material. Subsequent to the Appellate Division’s decision, in Sage v. Freehold Reg’l High Sch. Dist. (Monmouth), GRC Complaint No. 2010-108 (Final Decision dated November 29, 2011), the Council was tasked with determining whether a student’s handwritten notes were exempt as ACD material. There, the complainant argued that O’Shea, did not apply because the notes were not taken during a public meeting and thereafter used as a memory aid. However, the Council conducted an *in camera* review and held that “. . . because the handwritten student note contain[ed] information of an alleged incident . . . and was used in preparation of . . . Final Incident Report.” Id. (Final Decision dated November 29, 2011) at 6. See also Lotito v. N.J. Dep’t of Labor, Div. of Unemployment Ins., GRC Complaint No. 2013-67 (Interim Order dated March 25, 2014).

Regarding audio and video recordings, in C.W. v. William Patterson Univ., GRC Complaint No. 2008-216 (August 2009), the complainant sought access to an unredacted copy of a recording of his disciplinary hearing. The custodian denied access based on the Council’s decision in C.W. v. William Patterson Univ., GRC Complaint No. 2003-80 (March 2005). The complainant subsequently filed a complaint arguing that the GRC should reconsider its decision in C.W., GRC 2003-80 based on a conflict between OPRA and FERPA. The Council declined and held that the custodian lawfully denied access to an unredacted version of the responsive recording.

Regarding *in camera* reviews, in Paff v. N.J. Dep’t of Labor, Bd. of Review, 379 N.J. Super. 346, 355 (App. Div. 2005), the complainant appealed a final decision of the Council<sup>6</sup> 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.

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<sup>6</sup> Paff v. N.J. Dep’t of Labor, Bd. of Review, GRC Complaint No. 2003-128 (October 2005).

[Id. at 355.]

Further, the court found that:

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 this matter, the Custodian denied access to “reports, notes . . . and electronic audio and video recordings” on the basis that the request was invalid but added that any responsive records would be exempt under the ACD exemption. The Custodian subsequently argued this position in the SOI but noted that he did not perform a search because the request was invalid. Thus, it is not clear whether any responsive reports, notes or recordings exist. Based on this, the GRC must first ascertain whether any responsive records exist. If so, the Custodian is required under Paff to send the records to the GRC for *in camera* review to determine if they are exempt from disclosure as ACD material.

Accordingly, the Custodian may have unlawfully denied access to “reports, notes . . . and electronic audio and video recordings.” N.J.S.A. 47:1A-6. The Custodian must thus search for and locate those responsive reports, notes, and recordings related to the HIB allegations from May 10, 2019 through the date of the OPRA request. If no records exist, the Custodian must certify to this fact inclusive of a detailed explanation of the search conducted.

Should the Custodian locate responsive records, he must provide unredacted copies of them to the Council for *in camera* review to determine the validity of the Custodian’s assertion that the e-mails were exempt under the ACD material exemption under OPRA. N.J.S.A. 47:1A-1.1; See Paff, 379 N.J. Super. at 355. The GRC notes that this finding is not applicable if the Custodian certifies that no records exist.

### **Knowing & Willful**

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

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. The portion of the Complainant’s request seeking “any and all records” including “files,



documents . . . memos, e-mails, text messages” and “everything involving” “Harassment, Intimidation, and Bullying” allegations filed on behalf of F.P. is invalid because it failed to identify a specific record or include the required criteria. MAG Entm’t, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005); Bent v. Stafford Police Dep’t, 381 N.J. Super. 30, 37 (App. Div. 2005); N.J. Builders Ass’n v. N.J. Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009); Feiler-Jampel v. Somerset Cnty. Prosecutor’s Office, GRC Complaint No. 2007-190 (Interim Order dated March 26, 2008); Lewis-Gallagher v. Monroe Twp. Pub. Sch. Dist. (Gloucester), GRC Complaint No. 2018-8 (September 2019). Thus, the Custodian lawfully denied access to this portion of the request. N.J.S.A. 47:1A-6.

2. As a threshold matter, the Custodian unlawfully denied access to the Complainant’s OPRA request seeking “reports, notes . . . and electronic audio and video recordings.” N.J.S.A. 47:1A-6. Specifically, the Complainant qualified as an excepted person under N.J.A.C. 6A:32-7.5(e)(1) and was thus entitled to receipt of F.P.’s student records. L.R. v. Camden City Pub. Sch. Dist., 452 N.J. Super. 56 (App. Div. 2017).
3. The Custodian may have unlawfully denied access to “reports, notes . . . and electronic audio and video recordings.” N.J.S.A. 47:1A-6. The Custodian must thus search for and locate those responsive reports, notes, and recordings related to the “Harassment, Intimidation, and Bullying” allegations from May 10, 2019 through the date of the OPRA request. If no records exist, the Custodian must certify to this fact inclusive of a detailed explanation of the search conducted.
4. **The Custodian shall comply with conclusion No. 3 above within five (5) business days from receipt of the Council’s Interim Order. Further, the Custodian shall simultaneously deliver<sup>7</sup> certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,<sup>8</sup> to the Executive Director.<sup>9</sup>**
5. Should the Custodian locate responsive records, he must provide unredacted copies of them to the Council for *in camera* review to determine the validity of the Custodian’s assertion that the e-mails were exempt under the “inter-agency or intra-agency advisory, consultative, or deliberative material” exemption under OPRA. N.J.S.A. 47:1A-1.1; See Paff v. N.J. Dep’t of Labor, Bd. of Review, 379 N.J. Super. 346, 355 (App. Div. 2005). The GRC notes that this conclusion is not applicable if the Custodian certifies that no records exist.

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<sup>7</sup> 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.

<sup>8</sup> “I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.”

<sup>9</sup> Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

6. **The Custodian shall deliver<sup>10</sup> to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see conclusion No. 5 above), nine (9) copies of the redacted records, a document or redaction index<sup>11</sup>, as well as a legal certification from the Custodian, in accordance with R. 1:4-4, 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.**
7. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Prepared By: Frank F. Caruso  
Executive Director

February 16, 2021

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<sup>10</sup> 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.

<sup>11</sup> The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.