



**State of New Jersey**  
**GOVERNMENT RECORDS COUNCIL**

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COMMISSIONER JOSEPH V. DORIA, JR.  
COMMISSIONER LUCILLE DAVY  
ROBIN BERG TABAKIN  
DAVID FLEISHER  
CATHERINE STARGHILL Esq., Executive Director

**INTERIM ORDER**

**April 30, 2008 Government Records Council Meeting**

George Burdick  
Complainant

Complaint No. 2007-74

v.

Franklin Township Board of Education (Hunterdon)  
Custodian of Record

At the April 30, 2008 public meeting, the Government Records Council ("Council") considered the April 23, 2008 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted to adopt the entirety of said findings and recommendations by majority vote. The Council, therefore, finds that:

1. Because the Custodian released the requested attendance records labeled "Franklin Township School Staff Attendance Record" all full time employees and all members of the administration at Franklin Township School for the period of July 1, 2005 to June 30, 2006 to the Complainant with appropriate redactions including a detailed lawful basis for said redactions and because the Custodian provided certified confirmation of compliance, pursuant to N.J. Court Rule 1:4-4, to the Executive Director, the Custodian has complied with the Council's January 30, 2008 Interim Order.
2. As previously decided by the Council on October 31, 2007 and January 30, 2008, because the Custodian failed to include the "Franklin Township School Staff Attendance Record" as a record responsive to the Complainant's request in the Custodian's Statement of Information and because the Custodian has not carried her burden of proving a lawful denial of access to the requested attendance records, 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 complaint shall be referred to the Office of Administrative Law for determination of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances. Should the Custodian's contact information change prior to the Council's final determination in this matter, the Custodian shall so advise the GRC.



Interim Order Rendered by the  
Government Records Council  
On The 30<sup>th</sup> Day of April, 2008

Robin Berg Tabakin, Chairman  
Government Records Council

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

David Fleisher, Vice Chairman & Secretary  
Government Records Council

**Decision Distribution Date: April 30, 2008**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director  
April 30, 2008 Council Meeting**

**George F. Burdick, Jr.<sup>1</sup>  
Complainant**

**GRC Complaint No. 2007-74**

v.

**Franklin Township Board of Education (Hunterdon)<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:** Attendance records of all full time employees and all members of the administration at Franklin Township School for the period of July 1, 2005 to June 30, 2006 inclusive.

**Request Made:** February 9, 2007

**Response Made:** February 20, 2007

**Custodian:** Gloria J. Gross

**GRC Complaint Filed:** February 28, 2007

**Background**

**January 30, 2008**

Government Records Council's ("Council") Interim Order. At its January 30, 2008 public meeting, the Council considered the January 23, 2008 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council adopted the entirety of said findings and recommendations by majority vote. The Council, therefore, found that:

1. The Council declines to withdraw its October 31, 2007 Interim Order for the following reasons:
  - a. The Council's Order is based on substantial evidence in the record because the Complainant requested identifiable government records (attendance records) and the Custodian failed to bear her burden of proving a lawful denial of access to records maintained on file entitled "Franklin Township School Staff Attendance Record."
  - b. Although the Complainant's request may be clear to the GRC, the Council held that if the Custodian required clarification of said

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

<sup>2</sup> Represented by Thomas O. Johnston, Esq. (Morristown, NJ).

request, she could have requested such pursuant to James Cody v. Middletown Township Public Schools, GRC Complaint No. 2005-98 (December 2005).

- c. Because the Complainant requested attendance records of all full time employees and all members of the administration at Franklin Township School for the period of July 1, 2005 to June 30, 2006 inclusive and the “Franklin Township School Staff Attendance Record” has been identified as a record maintained on file, the Council ordered the Custodian to release the “Franklin Township School Staff Attendance Record” of all full time employees and all members of the administration at Franklin Township School for the period of July 1, 2005 to June 30, 2006 inclusive with appropriate redactions and a legal justification for each redacted part thereof.
  - d. If any information contained within the requested records is exempt under OPRA or any other law, it is the Custodian’s responsibility, not the GRC’s, to redact said information in accordance with the law and provide a legal citation for each redacted portion pursuant to N.J.S.A. 47:1A-6.
  - e. Pursuant to N.J.S.A. 47:1A-7.e., the Council was within its authority as part of the adjudicatory process to issue its Interim Order compelling production of the requested record, that is, the Council “[made] a determination as to a record’s accessibility based upon the complaint and the custodian’s response thereto.”
  - f. The Council was also within its authority as part of the adjudicatory process to note that the Custodian’s actions may have violated OPRA and preserve the issue for a hearing pursuant to N.J.S.A. 47:1A-7.e analyzing the totality of the circumstances surrounding the record’s accessibility. See In re Request for Solid Waste Util. Customer Lists, 106 N.J. 508 (1987).
2. Because the Custodian’s Counsel failed to bear the burden of proving the requirements for a stay set forth in Crowe v. DeGioia, 90 N.J. 126, (1982), Counsel’s request for a stay should not be granted.
  3. **The Custodian shall release the requested attendance records labeled “Franklin Township School Staff Attendance Record” of all full time employees and all members of the administration at Franklin Township School for the period of July 1, 2005 to June 30, 2006 to the Complainant with appropriate redactions. The Custodian must provide a redaction index detailing the nature of the information redacted and the lawful basis of the redactions.**
  4. **The Custodian shall comply with item #3 above within five (5) business days from receipt of the Council’s Interim Order and**

**simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, as well as a legal explanation and statutory citation for each redaction, if any, as required under N.J.S.A. 47:1A-6, to the Executive Director.**

5. As previously decided by the Council on October 31, 2007, because the Custodian failed to include the “Franklin Township School Staff Attendance Record” as a record responsive to the Complainant’s request in the Custodian’s Statement of Information and because the Custodian has not carried her burden of proving a lawful denial of access to the requested attendance records, 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 complaint shall be referred to the Office of Administrative Law for determination of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances. However, the Council defers such referral pending the Custodian’s compliance with the Council’s Interim Order.

#### **February 4, 2008**

Council’s Interim Order distributed to the parties.

#### **February 6, 2008**

E-mail from Complainant to GRC. The Complainant confirms receipt of forty-five (45) school employees’ “Franklin Township School Staff Attendance Record” for the period of July 1, 2005 to June 30, 2006. The Complainant states that the Custodian made redactions to four (4) of the records responsive and that the Complainant accepts the legal basis for said redactions. Additionally, the Complainant states that the attendance records of five (5) employees are marked “without pay.” The Complainant contends that this confirms his original assertion that the attendance records are used for payroll purposes. The Complainant asserts that this evidence is in direct opposition to the Custodian’s certification dated June 27, 2007. The Complainant also states that this e-mail does not act in lieu of the Custodian’s certified confirmation of compliance.

#### **February 6, 2008**

Custodian’s response to the Council’s Interim Order. The Custodian certifies that on February 6, 2008 she provided the Complainant with the “Franklin Township School Staff Attendance Record” for all full time employees and all members of the administration at Franklin Township School for the period of July 1, 2005 to June 30, 2006. The Custodian certifies that upon consultation with legal counsel, she redacted information from the following staff members’ attendance record: Stacey Viscel; Trina Lahman; Janet Prassl; and Leslie McClusker. The Custodian certifies that the redacted portions contain personal personnel information which is exempt from disclosure pursuant to N.J.S.A. 47:1A-10. The Custodian also certifies that the redacted information does not contain any of the information excluded from OPRA’s personnel exemption such as an individual’s name, title, position, salary, payroll record, length of service, date of separation and the reason for such separation, or the amount and type of any pension

received. Additionally, the Custodian certifies that she did not redact any additional information from the records responsive to the Complainant's request.

**February 25, 2008<sup>3</sup>**

E-mail from Complainant to GRC with Franklin Township BOE's public meeting agenda dated February 25, 2008 attached. The Complainant states that as per said agenda, the Custodian is resigning effective April 14, 2008.

**Analysis**

**Whether the Custodian complied with the Council's January 30, 2008 Interim Order?**

The Custodian certifies that on February 6, 2008 she provided the Complainant with the "Franklin Township School Staff Attendance Record" for all full time employees and all members of the administration at Franklin Township School for the period of July 1, 2005 to June 30, 2006. The Custodian certifies that upon consultation with legal counsel, she redacted information from the following staff members' attendance record: Stacey Viscel; Trina Lahman; Janet Prassl; and Leslie McClusker. The Custodian certifies that the redacted portions contain personal personnel information which is exempt pursuant to N.J.S.A. 47:1A-10. The Custodian also certifies that the redacted information does not contain any of the information excluded from OPRA's personnel exemption such as an individual's name, title, position, salary, payroll record, length of service, date of separation and the reason for such separation, and the amount and type of any pension received.

The Complainant confirms receipt of forty-five (45) school employees' "Franklin Township School Staff Attendance Record" for the period of July 1, 2005 to June 30, 2006. The Complainant states that the Custodian made redactions to four (4) of the records responsive and accepts the legal basis for said redactions.

Therefore, because the Custodian released the requested attendance records labeled "Franklin Township School Staff Attendance Record" of all full time employees and all members of the administration at Franklin Township School for the period of July 1, 2005 to June 30, 2006 to the Complainant with appropriate redactions including a detailed lawful basis for said redactions and because the Custodian provided certified confirmation of compliance, pursuant to N.J. Court Rule 1:4-4, to the Executive Director, the Custodian has complied with the Council's January 30, 2008 Interim Order.

**Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. Because the Custodian released the requested attendance records labeled "Franklin Township School Staff Attendance Record" of all full time

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<sup>3</sup> Additional correspondence submitted by the parties; however said correspondence is not relevant to the adjudication of this complaint.

employees and all members of the administration at Franklin Township School for the period of July 1, 2005 to June 30, 2006 to the Complainant with appropriate redactions including a detailed lawful basis for said redactions and because the Custodian provided certified confirmation of compliance, pursuant to N.J. Court Rule 1:4-4, to the Executive Director, the Custodian has complied with the Council's January 30, 2008 Interim Order.

2. As previously decided by the Council on October 31, 2007 and January 30, 2008, because the Custodian failed to include the "Franklin Township School Staff Attendance Record" as a record responsive to the Complainant's request in the Custodian's Statement of Information and because the Custodian has not carried her burden of proving a lawful denial of access to the requested attendance records, 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 complaint shall be referred to the Office of Administrative Law for determination of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances. Should the Custodian's contact information change prior to the Council's final determination in this matter, the Custodian shall so advise the GRC.

Prepared By:

Dara Lownie  
Senior Case Manager

Approved By:

Catherine Starghill, Esq.  
Executive Director

April 23, 2008



**State of New Jersey**  
**GOVERNMENT RECORDS COUNCIL**

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**INTERIM ORDER**

**January 30, 2008 Government Records Council Meeting**

George Burdick  
Complainant

Complaint No. 2007-74

v.

Franklin Township Board of Education  
Custodian of Record

At the January 30, 2008 public meeting, the Government Records Council ("Council") considered the January 23, 2008 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 Council declines to withdraw its October 31, 2007 Interim Order for the following reasons:
  - a. The Council's Order is based on substantial evidence in the record because the Complainant requested identifiable government records (attendance records) and the Custodian failed to bear her burden of proving a lawful denial of access to records maintained on file entitled "Franklin Township School Staff Attendance Record."
  - b. Although the Complainant's request may be clear to the GRC, the Council held that if the Custodian required clarification of said request, she could have requested such pursuant to James Cody v. Middletown Township Public Schools, GRC Complaint No. 2005-98 (December 2005).
  - c. Because the Complainant requested attendance records of all full time employees and all members of the administration at Franklin Township School for the period of July 1, 2005 to June 30, 2006 inclusive and the "Franklin Township School Staff Attendance Record" has been identified as a record maintained on file, the Council ordered the Custodian to release the "Franklin Township School Staff Attendance Record" of all full time employees and all



members of the administration at Franklin Township School for the period of July 1, 2005 to June 30, 2006 inclusive with appropriate redactions and a legal justification for each redacted part thereof.

- d. If any information contained within the requested records is exempt under OPRA or any other law, it is the Custodian's responsibility, not the GRC's, to redact said information in accordance with the law and provide a legal citation for each redacted portion pursuant to N.J.S.A. 47:1A-6.
  - e. Pursuant to N.J.S.A. 47:1A-7.e., the Council was within its authority as part of the adjudicatory process to issue its Interim Order compelling production of the requested record, that is, the Council "[made] a determination as to a record's accessibility based upon the complaint and the custodian's response thereto."
  - f. The Council was also within its authority as part of the adjudicatory process to note that the Custodian's actions may have violated OPRA and preserve the issue for a hearing pursuant to N.J.S.A. 47:1A-7.e analyzing the totality of the circumstances surrounding the record's accessibility. See In re Request for Solid Waste Util. Customer Lists, 106 N.J. 508 (1987).
2. Because the Custodian's Counsel failed to bear the burden of proving the requirements for a stay set forth in Crowe v. DeGioia, 90 N.J. 126, (1982), Counsel's request for a stay should not be granted.
  3. **The Custodian shall release the requested attendance records labeled "Franklin Township School Staff Attendance Record" of all full time employees and all members of the administration at Franklin Township School for the period of July 1, 2005 to June 30, 2006 to the Complainant with appropriate redactions. The Custodian must provide a redaction index detailing the nature of the information redacted and the lawful basis of the redactions.**
  4. **The Custodian shall comply with item #3 above within five (5) business days from receipt of the Council's Interim Order and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, as well as a legal explanation and statutory citation for each redaction, if any, as required under N.J.S.A. 47:1A-6, to the Executive Director.**
  5. As previously decided by the Council on October 31, 2007, because the Custodian failed to include the "Franklin Township School Staff Attendance Record" as a record responsive to the Complainant's request

in the Custodian's Statement of Information and because the Custodian has not carried her burden of proving a lawful denial of access to the requested attendance records, 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 complaint shall be referred to the Office of Administrative Law for determination of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances. However, the Council defers such referral pending the Custodian's compliance with the Council's Interim Order.

Interim Order Rendered by the  
Government Records Council  
On The 30<sup>th</sup> Day of January, 2008

Robin Berg Tabakin, Vice Chairman  
Government Records Council

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

David Fleisher, Secretary  
Government Records Council

**Decision Distribution Date: January 31, 2008**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

*Regarding Custodian Counsel's Motion for a Stay*  
**Supplemental Findings and Recommendations of the Executive Director  
January 30, 2008 Council Meeting**

**George F. Burdick, Jr.<sup>1</sup>**  
**Complainant**

**GRC Complaint No. 2007-74**

**v.**

**Franklin Township Board of Education (Hunterdon)<sup>2</sup>**  
**Custodian of Records**

**Records Relevant to Complaint:** Attendance records of all full time employees and all members of the administration at Franklin Township School for the period of July 1, 2005 to June 30, 2006 inclusive.

**Request Made:** February 9, 2007

**Response Made:** February 20, 2007

**Custodian:** Gloria J. Gross

**GRC Complaint Filed:** February 28, 2007

**Background**

**October 31, 2007**

Government Records Council's ("Council") Interim Order. At its October 31, 2007 public meeting, the Council considered the October 24, 2007 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. Because the Complainant's request for attendance records specifically identified a government record pursuant to Mag Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super 534, 546 (March 2005), and because the Custodian could have requested clarification from the Complainant regarding his OPRA request pursuant to James Cody v. Middletown Township Public Schools, GRC Complaint No. 2005-98 (December 2005), the Custodian has not borne her burden of proving a lawful denial of access pursuant to N.J.S.A. 47:1A-6.
2. Pursuant to N.J.S.A. 47:1A-6, the Custodian has not carried her burden of proving a lawful denial of access to the requested attendance records because said records are considered payroll records which are subject to public access

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

<sup>2</sup> Represented by Thomas O. Johnston (Morristown, NJ).

pursuant to N.J.S.A. 47:1A-10 and Gerald Weimer v. Township of Middletown, GRC Complaint No. 2004-22 (August 2005).

3. **The Custodian shall release the requested attendance records labeled “Franklin Township Staff Attendance Record” to the Complainant with appropriate redactions. The Custodian must provide a redaction index detailing the nature of the information redacted and the lawful basis of the redactions.**
4. **The Custodian shall comply with item #3 above within five (5) business days from receipt of the Council’s Interim Order and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, as well as a legal explanation and statutory citation for each redaction, if any, as required under N.J.S.A. 47:1A-6, to the Executive Director.**
5. Because the Custodian failed to include the “Franklin Township Staff Attendance Record” as a record responsive to the Complainant’s request in the Custodian’s Statement of Information and because the Custodian has not carried her burden of proving a lawful denial of access to the requested attendance records, 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 complaint shall be referred to the Office of Administrative Law for determination of whether the custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.

### **November 15, 2007**

Council’s Interim Order distributed to the parties.

### **November 21, 2007**

Custodian Counsel’s response to the Council’s Interim Order. Counsel requests that the Council withdraw the Interim Order or grant a stay of the matter.

Counsel states that the Council found that the “Complainant’s request for attendance records specifically identified a government record” but also that the “Custodian could have requested clarification from the Complainant regarding his OPRA request.” Counsel states that the Council also found that the Custodian did not meet her burden of proving a lawful denial of access because “the requested attendance records” are “considered payroll records.” Counsel states that the Interim Order directs the Custodian to “release the requested attendance records labeled ‘Franklin Township School Staff Attendance Record’ to the Complainant with appropriate redactions.” Counsel states that the GRC is silent on the other records identified as attendance records.

Additionally, Counsel states that the Council held that “because the Custodian failed to include the ‘Franklin Township School Staff Attendance Record’ as a record responsive to the Complainant’s request...this complaint shall be referred to the Office of Administrative Law for determination of whether the Custodian knowingly and willfully

violated OPRA and unreasonably denied access under the totality of the circumstances.” Counsel states that pursuant to N.J.S.A. 47:1A-7.e., the Council can refer a matter to the Office of Administrative Law only if the Council is unable to make a determination to a record’s accessibility based upon the complaint and the custodian’s response thereto. Counsel asserts that there is no provision in the statute for the Council to issue an Interim Order compelling production of the requested records while keeping the matter open for a hearing analyzing the totality of the circumstances over the record’s accessibility. Counsel contends that the Council lacks the authority to issue an Interim Order compelling the production of the requested records until the record is closed. Counsel also contends that the Interim Order should be withdrawn because production of any of the requested records is premature as the factual record remains open.

Further, Counsel asserts that the Interim Order is not clear because said Order does not explain why the “Franklin Township School Staff Attendance Record” must be released and not any other attendance records. Counsel states that the Complainant provided an unredacted copy of the requested record to the Council’s staff (herein “GRC”), yet the Council is ordering the Custodian to produce a redacted copy of the same record to the Complainant. Counsel requests that the GRC clarify which records the Custodian is ordered to release.

Additionally, Counsel contends that a stay should be entered because there is an imminent risk of irreparable harm. Counsel states that personnel records are exempt from public disclosure and that said protection is codified in OPRA. Counsel asserts that if the Custodian produces attendance records, there is no means by which the employee can be compensated for his or her privacy violations. Counsel contends that no party will be injured upon the entering of a stay because there is no imminent need for the production of the records before a full analysis of the record can be conducted. Counsel also asserts that the public interest calls for a stay of the Council’s Interim Order.

Counsel also asserts that the Interim Order is based on erroneous findings. Counsel states that the Council held that the Complainant specifically identified a government record. However, Counsel states that the “Franklin Township School Staff Attendance Record” was identified after the GRC commenced its investigation of this complaint. Counsel contends that a custodian cannot be deemed in violation of OPRA for not producing a record that was identified by a requestor after filing a complaint with the GRC. Additionally, Counsel contends that the GRC has not and cannot cite to any legal authority to support its determination that attendance records are *per se* payroll records.

### **November 26, 2007<sup>3</sup>**

Letter from Complainant to GRC. The Complainant asserts that the Custodian Counsel’s requests for either a withdrawal or a stay of the Interim Order are frivolous and without factual basis and should be denied. The Complainant contends that Counsel’s purpose is to obstruct the statutory requirement of the GRC to conduct all complaints in an expeditious manner.

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<sup>3</sup> Additional correspondence was submitted by the parties; however, said correspondence is not relevant to the adjudication of this complaint.

The Complainant states that Counsel raises the issue of clarification. The Complainant states that Counsel first raised this issue one hundred and forty-six (146) days after the Custodian denied the Complainant's OPRA request. The Complainant states that in a letter to the GRC dated July 13, 2007 Counsel stated that "[a] specific request for an identifiable government record was not made in this case..." The Complainant states that the Custodian denied access to the requested records on February 20, 2007 by stating that "...attendance records are not kept as part of payroll records in the normal course unless compensation was reduced for non-attendance. The 'attendance records' that you requested are not public records, and therefore, cannot be produced." The Complainant states that the Custodian did not request any clarification at the time of the denial.

The Complainant states that Counsel raises the issue that the Interim Order directs the Custodian to release the requested attendance records labeled "Franklin Township School Staff Attendance Record" to the Complainant with appropriate redactions but that the GRC is silent on the other records identified as attendance records. The Complainant states that the "Franklin Township School Staff Attendance Record" for full time employees and all members of the administration at the Franklin Township School for the period July 1, 2005 to June 30, 2006 are the only documents requested. The Complainant states that on July 13, 2007 Counsel asserted that the Complainant's request was invalid because "a specific request for an identifiable document was not made in this case." The Complainant also states that on March 28, 2007, one hundred and ten (110) days prior to July 13, 2007, Counsel described the "Franklin Township School Staff Attendance Record" as follows: "[i]n addition to the employee's name and dates of absences, the subject attendance records set forth whether the employee is absent due to personal illness, personal reasons, death in the immediate family, or death of a friend." The Complainant asserts that his request was clear enough on March 28, 2007 for Counsel to describe the record requested, but states that Counsel does not provide any evidence to support his assertion as to why the request became unclear on July 13, 2007 or is unclear now.

The Complainant states that Counsel does not provide any evidence that suggests that any other personal information is contained on the "Franklin Township School Staff Attendance Record." The Complainant also states that if by "other attendance records" Counsel is referring to the attendance sign-in sheet, the Complainant is not requesting said record. The Complainant states that he does not know the other attendance records to which Counsel refers. The Complainant asserts that if there are attendance records in addition to the "Franklin Township School Staff Attendance Record" that are in existence and are in use at the school, the GRC should admonish the Custodian and Counsel for their failure to include these documents in the document index under item #9 of the Custodian's Statement of Information.

The Complainant states that Counsel alleges that the GRC can refer a matter to the OAL only 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 pursuant to N.J.S.A. 47:1A-7.e. The Complainant asserts that Counsel's interpretation of this provision is false and without merit. The Complainant states that N.J.S.A. 47:1A-7.e states that:

“...If the council is unable to make a determination as to a record’s accessibility based upon the complaint and the custodian’s response thereto, the council shall conduct a hearing on the matter in conformity with the rules and regulations provided for hearings by a state agency in contested cases under the “Administrative Procedures Act...”

Regarding Counsel’s contention that the GRC lacks the authority to issue an Interim Order compelling production of the requested records while keeping the complaint open for a hearing analyzing the totality of the circumstances, the Complainant states that OPRA provides that “[t]he council shall, by a majority vote of its members, render a decision as to whether the record which is the subject of the complaint is a government record which must be made available for public access...” The Complainant asserts that in accordance with the statute, the Council ordered the Custodian to release the requested record after the Council found that said record is a government record pursuant to OPRA.

Additionally, the Complainant states that Counsel raised the issue that the Complainant provided the GRC with a copy of the “Franklin Township School Staff Attendance Record.” The Complainant states that this is true but that the Custodian failed to mention that he also submitted a copy of the “Franklin Township School Staff Attendance Record” to the GRC for an *in camera* review which was not previously ordered by a majority vote of the Council.<sup>4</sup> The Complainant states that the Custodian also submitted absence reports which the Complainant states he did not request. The Complainant reiterates that he requested attendance records only.

The Complainant also disputes Counsel’s claim that the Interim Order does not precisely identify which record the Custodian is ordered to provide. The Complainant states that the Interim Order specifically directs the Custodian to release the requested records labeled “Franklin Township School Staff Attendance Record” with appropriate redactions.

Further, the Complainant asserts that while Counsel contends that a stay should be entered because there is an imminent risk of irreparable harm, Counsel does not define harm. The Complainant contends that in order to obtain a stay, Counsel must establish the following pursuant to Crowe v. DeGioia, 90 N.J. 126, 132-34 (1981):

1. The Custodian or the Board of Education will suffer irreparable injury if the stay is denied.
2. The Custodian’s claim is based on a settled legal right.
3. The material facts are substantially undisputed.
4. If the stay is denied, the harm to the Custodian or the Board of Education will be greater than the harm to the opposing party, if the stay is granted.

The Complainant asserts that the material facts in this matter are in absolute dispute. The Complainant contends that in the absence of any proof or evidence

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<sup>4</sup> The GRC does not conduct *in camera* reviews at the request of the parties, and as such, did not do so in this matter.

substantiating the criteria enumerated above, Counsel has not proven irreparable harm and his request for a withdrawal or a stay should be denied.

Also, the Complainant states that although Counsel asserts that it is well settled that personnel records are exempt from public access, Counsel fails to submit any evidence to support his assertion of the personnel exemption. The Complainant states that in Serrano v. South Brunswick Township, 358 N.J. Super. 352 (App. Div. 2003), the court ruled that “[t]his government record does not become cloaked with confidentiality simply because the prosecutor declares it so.” The Complainant contends that in the absence of any proof based on a settled legal right, Counsel’s assertion that the “Franklin Township School Staff Attendance Record” is exempt is a bare assumption. The Complainant states that in Nolan v. Fleck, N.J. Superior Court, Appellate Division, Docket No. A 5727-04T2, the court held that “[b]are assertions are inadequate.”<sup>5</sup>

The Complainant also disputes Counsel’s claim that the GRC has not and cannot cite to any legal authority to support its determination that attendance records are *per se* payroll records. The Complainant contends that the GRC is not required to make said determination because such determination was already established pursuant to N.J.S.A. 47:1A-10 and Gerald Weimer v. Township of Middletown, GRC Complaint No. 2004-22 (August 2005). The Complainant states that under the totality of the circumstances and in the absence of a burden of proof from the Custodian that the denial of access was lawful, the GRC ruled that the “Franklin Township School Staff Attendance Record” is not exempt from disclosure.

In addition, the Complainant states that the GRC is statutorily obligated to avoid determinations which are arbitrary and capricious or unreasonable, or that would otherwise violate legislative policies expressed or applied in OPRA. *See Serrano, supra*. The Complainant also states that pursuant to Burdick v. Franklin Township, GRC Complaint No. 2005-133 (July 2007), the GRC is statutorily obligated to raise the appropriate legal citation or authority in support of the custodian if the custodian or his/her attorney fails to cite any legal citation or authority that supports their burden of proof for a lawful denial of access. Additionally, the Complainant states that a decision of the GRC may be appealed to the Appellate Division of the NJ Superior Court.

The Complainant states that this matter, as referred to the Office of Administrative Law, is in regard to the unlawful denial of access to the Complainant’s request and whether the Custodian’s actions were intentional and deliberate with knowledge of their wrongfulness, not regarding the determination that attendance records are government records. The Complainant contends that referring the matter to OAL is to ensure fairness to the parties.

Further, the Complainant contends that the certification necessary to establish that the copies submitted to the Complainant and the GRC are true and accurate should be signed by the members of the Franklin Township BOE and not the Custodian or the Custodian’s Counsel because the Complainant alleges that the Custodian and Counsel do not convey the accurate facts or truth in this matter.

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<sup>5</sup> This appears to be an unpublished case of the NJ Superior Court, Appellate Division. George F. Burdick, Jr. v. Franklin Township Board of Education (Hunterdon), 2007-74 – Supplemental Findings and Recommendations of the Executive Director 6

## Analysis

### **Whether the Council should grant the Custodian's request for either a withdrawal of the Council's October 31, 2007 Interim Order or a stay of said Order?**

#### Request for a Withdrawal of the Council's Interim Order

Counsel disputes the Council's finding that the Complainant requested a specific government record but also that the Custodian could have requested clarification of the request.

On February 9, 2007, the Complainant requested attendance records of all full time employees and all members of the administration at Franklin Township School for the period of July 1, 2005 to June 30, 2006 inclusive. The Custodian denied the Complainant's request on February 20, 2007 on the basis that attendance records are not payroll records and said attendance records are exempt as personnel records pursuant to N.J.S.A. 47:1A-10. In the Custodian's Statement of Information ("SOI") dated March 28, 2007, the Custodian lists "Employee Absence Reports" and "June Staff Absence Report" as records responsive to the Complainant's request. However, also in the SOI, the Custodian states that "[i]n addition to the employee's name and dates of absences, the subject attendance records set forth whether the employee is absent due to personal illness, personal reasons, death in the immediate family, or death of a friend." The Complainant asserts that this statement describes the "Franklin Township School Staff Attendance Record" for which he is seeking. Counsel contends that the Complainant did not specify that the "Franklin Township School Staff Attendance Record" was the record being requested until April 4, 2007.

A comparison between the Complainant's request for "attendance records" and the title of the "Franklin Township School Staff Attendance Record" (emphasis added), a record which the Custodian certified on June 27, 2007 is maintained on file with the Board of Education ("BOE"), reveals that the Complainant did request an identifiable government record. Thus, the Council held that "the Complainant's request for attendance records specifically identified a government record pursuant to Mag Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (March 2005)."

However, the Custodian's Counsel failed to assert that the Complainant's request was broad or unclear until July 13, 2007, at which time Counsel stated in a letter to the GRC that, "[a] specific request for an identifiable document was not made in this case, and it was not the Custodian's responsibility to determine whether Mr. Burdick really wanted payroll records that reflected paid days off." Thus, the Council held that "the Custodian could have requested clarification from the Complainant regarding his OPRA request pursuant to James Cody v. Middletown Township Public Schools, GRC Complaint No. 2005-98 (December 2005)." The spirit of OPRA dictates that custodians work with complainants to identify the records being sought. In this case, although the Complainant's request is clear to the GRC, if the Custodian needed clarification she could have requested such.

Counsel requests that the GRC provide clarification as to which records the Custodian is ordered to release. Because the Complainant requested attendance records of all full time employees and all members of the administration at Franklin Township School for the period of July 1, 2005 to June 30, 2006 inclusive and the “Franklin Township School Staff Attendance Record” has been identified by the Complainant and confirmed by the Custodian as a record maintained on file, the Custodian is ordered to release the “Franklin Township School Staff Attendance Record” of all full time employees and all members of the administration at Franklin Township School for the period of July 1, 2005 to June 30, 2006 inclusive, with appropriate redactions and a legal justification for each redacted part thereof.

Counsel contends that the GRC did not provide greater detail as to the information to be redacted from the requested records. It should be noted that custodians are vested with the legal responsibility of granting and denying access in accordance with the law. OPRA provides that it “...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. Thus, if any information contained within the requested records is exempt under OPRA or any other law, it is the Custodian’s responsibility to identify and redact said information in accordance with the law and provide a legal citation for each redaction portion pursuant to N.J.S.A. 47:1A-6 and N.J.S.A. 47:1A-5.g., which requires custodians to provide requestors with the specific legal basis for a denial of access in addition to redacting any exempt information contained within the requested records.

Further, Counsel states that the GRC has not and cannot cite to any legal authority to support its determination that attendance records are *per se* payroll records. The Custodian, not the GRC, bears the burden of proving that the requested attendance records are not public records subject to public access pursuant to N.J.S.A. 47:1A-6. In this matter, the Custodian has failed to meet such burden.

Additionally, Counsel asserts that the GRC can refer a matter to the Office of Administrative Law only if the GRC is unable to make a determination to a record’s accessibility based upon the complaint and the custodian’s response thereto. This contention ignores long-standing principles of Administrative Law and the wide discretion granted to administrative agencies in deciding how best to approach legislatively assigned administrative tasks, especially when the task falls within a particular agency’s expertise. In re Failure by the Dept. of Banking and Ins. to Transmit a Proposed Dental Fee Schedule to OAL, 336 N.J. Super. 253 (App. Div. 2001).

Counsel also alleges that there is no provision in OPRA that permits the GRC to issue an Interim Order compelling production of the requested record while keeping the matter open for a hearing analyzing the totality of the circumstances over the record’s accessibility. Counsel for the Custodian states that the GRC lacks authority to issue an Interim Order compelling the production of the requested records until the record is closed, and asks that the Interim Order be withdrawn because production of any of the

requested records is premature while the factual record remains open. These assertions, however, have no foundation in the law.

The Government Records Council is empowered by the Open Public Records Act, N.J.S.A. 47:1A-7.b., to, among other things, “receive, hear, review and adjudicate a complaint filed by any person concerning a denial of access to a government record by a records custodian[.]” In connection with the adjudication of such complaints, the GRC is required to conduct an investigation into the circumstances surrounding the complaint. N.J.S.A. 47:1A-7.e. This investigation includes an opportunity for a custodian of records to “to present the board with any statement or information concerning the complaint which the custodian wishes.” *Id.* Upon conclusion of the investigation, “[i]f the council is able to make a determination as to a record's accessibility based upon the complaint and the custodian's response thereto, it shall reduce that conclusion to writing and transmit a copy thereof to the complainant and to the records custodian against whom the complaint was filed.” *Id.*

N.J.S.A. 47:1A-7.e. further provides that:

[i]f the Council is unable to make a determination as to a record's accessibility based upon the complaint and the custodian's response thereto, the council shall conduct a hearing on the matter in conformity with the rules and regulations provided for hearings by a state agency in contested cases under the ‘Administrative Procedure Act,’ .... The council shall, by a majority vote of its members, render a decision as to whether the record which is the subject of the complaint is a government record which must be made available for public access pursuant to [OPRA] as amended and supplemented. If the council determines, by a majority vote of its members, that a custodian has knowingly and willfully violated [OPRA] as amended and supplemented, and is found to have unreasonably denied access under the totality of the circumstances, the council may impose the penalties provided for in [N.J.S.A. 47:1A-11]... All proceedings of the council pursuant to this subsection shall be conducted as expeditiously as possible. N.J.S.A. 47:1A-7.e.

How an agency chooses to implement legislation is the agency's primary responsibility. The court gives agencies wide discretion in deciding how best to approach legislatively assigned administrative tasks, especially when the task falls within a particular agency's expertise. In re Failure by the Dept. of Banking and Ins., supra. When interpreting a statute, a court must first look at the wording of the statute to ascertain its plain meaning and intent. The court's duty is to apply the legislative intent as expressed in the statute's language. *Id.* at 264-65. The court normally gives substantial deference to the interpretation of the agency charged with enforcing an act. *Id.*

Courts recognize that powers expressly granted to an administrative agency should be liberally construed so that the agency can fulfill the legislature's purpose, and an agency's express authority is augmented by such incidental authority as may be reasonably necessary or appropriate to effectuate the expressly delegated authority. In re Request for Solid Waste Util. Customer Lists, 106 N.J. 508 (1987).

Pursuant to the Administrative Procedures Act, a “contested case” (as defined at N.J.S.A. 52:14B-2(b)),<sup>6</sup> requires that all parties be afforded an opportunity for hearing after reasonable notice, N.J.S.A. 52:14B-9(a). A contested case includes those disputes where by statute or constitutional provision a hearing is required before a State agency to determine rights, duties, obligations, privileges, benefits, or other legal relations of specific parties. Division of State Police v. Maguire, 368 N.J. Super. 564 (App Div. 2004). To determine whether a contested case exists under the Administrative Procedures Act, the following three questions must be addressed: 1) is a hearing required by statute or constitutional provision; 2) will the hearing adjudicate rights, duties, obligations, privileges, benefits or other legal relations; and 3) are specific parties involved rather than large segments of the public. *Id.* at 572-73. The Uniform Administrative Procedure Rules at N.J.A.C. 1:1-3.1 provide that:

(a) A contested case shall be commenced in the State agency with appropriate subject matter jurisdiction. A contested case may be commenced by the agency itself or by an individual or entity as provided in the rules and regulations of the agency.

(b) A request for a contested case hearing may not be filed with the Office of Administrative Law by the individual or entity requesting the hearing. N.J.A.C. 1:1-3.1.

The Office of Administrative Law acquires jurisdiction over a matter only after it has been determined to be a contested case by an agency head and has been filed with the Office of Administrative Law. N.J.A.C. 1:1-3.2.

It is only when the proposed administrative action is based on disputed adjudicative facts that an evidentiary hearing is mandated. In re Request for Solid Waste Util. Customer Lists, *supra*, 106 N.J. at 517. Subject to the strictures of due process and of the Administrative Procedure Act, an agency may choose how to proceed. Accordingly, it is within the agency's discretion to select those procedures most appropriate to enable the agency to implement legislative policy. *Id.* at 519.

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<sup>6</sup> N.J.S.A. 52:14B-2(b) provides that: “‘Contested case’ means a proceeding, including any licensing proceeding, in which the legal rights, duties, obligations, privileges, benefits or other legal relations of specific parties are required by constitutional right or by statute to be determined by an agency by decisions, determinations, or orders, addressed to them or disposing of their interests, after opportunity for an agency hearing....” The Uniform Administrative Procedure Rules at N.J.A.C. 1:1-2.1 provide that “‘Contested case’ means an adversary proceeding, including any licensing proceeding, in which the legal rights, duties, obligations, privileges, benefits or other legal relations of specific parties are required by constitutional right or by statute to be determined by an agency by decisions, determinations, or orders, addressed to them or disposing of their interests, after opportunity for an agency hearing. N.J.S.A. 52:14B-2. The required hearing must be designed to result in an adjudication concerning the rights, duties, obligations, privileges, benefits or other legal relations of specific parties over which there exist disputed questions of fact, law or disposition relating to past, current or proposed activities or interests. Contested cases are not informational nor intended to provide a forum for the expression of public sentiment on proposed agency action or broad policy issues affecting entire industries or large, undefined classes of people.

Even when required, a hearing need not be tantamount to a trial. Sometimes nothing more is required than notice and the opportunity to present reasons, either orally or in writing, why the proposed action should not be taken. At other times, however, in addition to notice and the opportunity to be heard, due process may also require further procedural safeguards such as the opportunity to confront and cross-examine adverse witnesses, oral argument, presentation of evidence, and the right to retain an attorney. *Id.* at 521.

In the matter before the Council, the October 31, 2007 Interim Order of the Government Records Council found that the Custodian of Records failed to bear her burden of proof that access to the records requested by the Complainant, “[a]ttendance records of all full time employees and all members of the administration at Franklin Township School for the period of July 1, 2005 to June 30, 2006” was lawfully denied. The Council therefore ordered the Custodian to release certain specifically identified records which the Council determined to be government records absent the Custodian providing a lawful basis for the denial pursuant to N.J.S.A. 47:1A-6 and which must be made available for public access. The Council also determined that, based on the evidence of record, it is possible that the Custodian’s actions were intentional and deliberate, with knowledge of their wrongfulness, and that the complaint shall be referred to the Office of Administrative Law for a determination of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.

Based upon the specific language of OPRA at N.J.S.A. 47:1A-7.e., the Council was within its authority as part of the adjudicatory process to issue its Interim Order compelling production of the requested record, that is, the Council “[made] a determination as to a record’s accessibility based upon the complaint and the custodian’s response thereto.” N.J.S.A. 47:1A-7.e. Moreover, the Council was also within its authority as part of the adjudicatory process to note that the Custodian’s actions may have violated OPRA and preserve the issue for a hearing pursuant to N.J.S.A. 47:1A-7.e analyzing the totality of the circumstances surrounding the record’s accessibility. See In re Request for Solid Waste Util. Customer Lists, *supra*, 106 N.J. at 519. The Council’s transmittal to the Office of Administrative Law will not be made until the Custodian has had the opportunity to comply with the Council’s Interim Order because the matter will not be ripe for adjudication until that time. See, e.g., State, Dep’t of Environmental Protection v. Larchmont Farms, Inc., 266 N.J. Super. 16 (App. Div. 1993).

Therefore, the Council declines to withdraw its October 31, 2007 Interim Order for the following reasons:

1. The Council’s Order is based on substantial evidence in the record because the Complainant requested identifiable government records (attendance records) and the Custodian failed to bear her burden of proving a lawful denial of access to records maintained on file entitled “Franklin Township School Staff Attendance Record.”
2. Although the Complainant’s request may be clear to the GRC, the Council held that if the Custodian required clarification of said request, she could have

requested such pursuant to James Cody v. Middletown Township Public Schools, GRC Complaint No. 2005-98 (December 2005).

3. Because the Complainant requested attendance records of all full time employees and all members of the administration at Franklin Township School for the period of July 1, 2005 to June 30, 2006 inclusive and the "Franklin Township School Staff Attendance Record" has been identified as a record maintained on file, the Council ordered the Custodian to release the "Franklin Township School Staff Attendance Record" of all full time employees and all members of the administration at Franklin Township School for the period of July 1, 2005 to June 30, 2006 inclusive with appropriate redactions and a legal justification for each redacted part thereof.
4. If any information contained within the requested records is exempt under OPRA or any other law, it is the Custodian's responsibility, not the GRC's, to redact said information in accordance with the law and provide a legal citation for each redaction portion pursuant to N.J.S.A. 47:1A-6 and N.J.S.A. 47:1A-5.g., which requires custodians to provide requestors with the specific legal basis for a denial of access in addition to redacting any exempt information contained within the requested records.
5. Pursuant to N.J.S.A. 47:1A-7.e., the Council was within its authority as part of the adjudicatory process to issue its Interim Order compelling production of the requested record, that is, the Council "[made] a determination as to a record's accessibility based upon the complaint and the custodian's response thereto."
6. The Council was also within its authority as part of the adjudicatory process to note that the Custodian's actions may have violated OPRA and preserve the issue for a hearing pursuant to N.J.S.A. 47:1A-7.e analyzing the totality of the circumstances surrounding the record's accessibility. See In re Request for Solid Waste Util. Customer Lists, *supra*, 106 N.J. at 519.

#### Request for a Stay of the Council's Interim Order

The Custodian's Counsel requests a stay of the October 31, 2007 Interim Order of the Government Records Council. In matters involving applications for injunctive relief, including a stay of a final agency decision pending appeal, a movant must demonstrate all four prongs of the legal test set forth by the Supreme Court in Crowe v. De Gioia, 90 N.J. 126 (1982). First, an application for preliminary injunctive relief should be granted only "when necessary to prevent irreparable harm." Id. at 132. The second prong requires that the legal right underlying the applicant's claim be settled as a matter of law. Id. at 133. The third prong requires the applicant to "make a preliminary showing of a reasonable probability of ultimate success on the merits." Id. Fourth, the court must balance the resulting hardship to the parties in granting or denying preliminary injunctive relief. Id. at 134. The movant bears the burden of proving all four elements required for the injunction. Ibid., (citing Adams v. Freedom Forge Corp., 204 F.3d 475, 486 (3d Cir. 2000)).

In this matter currently before the Council, the Custodian's Counsel asserts the following justification for the requested stay:

**1. Danger of irreparable harm resulting from enforcement of the order**

Counsel contends that a stay should be entered because there is an imminent risk of irreparable harm if the order to disclose the record remains in force. Counsel states that personnel records are exempt from public disclosure and that said protection is codified in OPRA. Counsel asserts that if the Custodian produces attendance records and is exonerated, there is no means by which the employee can be compensated for his or her privacy violations. Counsel contends that no party will be injured upon the entering of a stay because there is no imminent need for the production of the records before a full analysis of the record can be conducted. Counsel also asserts that the public interest calls for a stay of the Council's Interim Order.

As previously stated, the Council's transmittal to the Office of Administrative Law will not be made until the Custodian has had the opportunity to comply with the Council's Interim Order because the matter will not be ripe for adjudication until that time. N.J.S.A. 52:14B-10; See, e.g., Jones v. NJ Department of Community Affairs, 395 N.J. Super. 632 (App. Div. 2007)( The eventual result of the administrative process should be a decision in the case that reflects determinations of appropriate administrative issues as well as the resolution of factual matters material to any constitutional issues). Thus, the Council will have conducted a full analysis of the record with the exception of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances prior to transmitting the matter to the Office of Administrative Law as a contested case.

Further, although Counsel asserts that the public interest calls for a stay of the Council's Interim Order, the Council maintains its position that the requested record, which the Complainant provided the GRC in blank form, is subject to public access under OPRA and should be released to the Complainant with appropriate redactions, if any, and a redaction index detailing each redaction asserted and the lawful basis for the denial.

**2. Legal right underlying applicant's claim is settled as a matter of law**

The Custodian's Counsel fails to provide any contentions that Counsel's claim is settled as a matter of law, thus failing to bear his burden of proving this requirement.

**3. Appeal presents a meritorious issue and movant has a likelihood of success on the merits**

The Custodian's Counsel does not make any assertions regarding the likelihood of success on the merits, thus failing to bear his burden of proving this requirement.

**4. Assessment of relative hardship to the parties reveals that a greater harm would occur if the stay is not granted**

The Custodian's Counsel fails to enunciate any general or specific harm which will result to the public interest from the disclosure of a record which should be redacted to protect all applicable privacy interests.

Therefore, in the present appeal, the Custodian's Counsel has not satisfied the requisite elements for injunctive relief. In fact, Counsel has only presented arguments on one of the four prongs of the Crowe test, and therefore, procedurally, cannot meet his burden of proving all required elements for relief. Nevertheless, in addressing the one argument point Counsel has presented, this is not persuasive in proving that there is a danger of irreparable harm resulting from enforcement of the Council's Interim Order. As such, Counsel's request for a stay should not be granted.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. The Council declines to withdraw its October 31, 2007 Interim Order for the following reasons:
  - a. The Council's Order is based on substantial evidence in the record because the Complainant requested identifiable government records (attendance records) and the Custodian failed to bear her burden of proving a lawful denial of access to records maintained on file entitled "Franklin Township School Staff Attendance Record."
  - b. Although the Complainant's request may be clear to the GRC, the Council held that if the Custodian required clarification of said request, she could have requested such pursuant to James Cody v. Middletown Township Public Schools, GRC Complaint No. 2005-98 (December 2005).
  - c. Because the Complainant requested attendance records of all full time employees and all members of the administration at Franklin Township School for the period of July 1, 2005 to June 30, 2006 inclusive and the "Franklin Township School Staff Attendance Record" has been identified as a record maintained on file, the Council ordered the Custodian to release the "Franklin Township School Staff Attendance Record" of all full time employees and all members of the administration at Franklin Township School for the period of July 1, 2005 to June 30, 2006 inclusive with appropriate redactions and a legal justification for each redacted part thereof.
  - d. If any information contained within the requested records is exempt under OPRA or any other law, it is the Custodian's responsibility, not the GRC's, to redact said information in

accordance with the law and provide a legal citation for each redacted portion pursuant to N.J.S.A. 47:1A-6.

- e. Pursuant to N.J.S.A. 47:1A-7.e., the Council was within its authority as part of the adjudicatory process to issue its Interim Order compelling production of the requested record, that is, the Council “[made] a determination as to a record’s accessibility based upon the complaint and the custodian’s response thereto.”
  - f. The Council was also within its authority as part of the adjudicatory process to note that the Custodian’s actions may have violated OPRA and preserve the issue for a hearing pursuant to N.J.S.A. 47:1A-7.e analyzing the totality of the circumstances surrounding the record’s accessibility. See In re Request for Solid Waste Util. Customer Lists, 106 N.J. 508 (1987).
2. Because the Custodian’s Counsel failed to bear the burden of proving the requirements for a stay set forth in Crowe v. DeGioia, 90 N.J. 126, (1982), Counsel’s request for a stay should not be granted.
  3. **The Custodian shall release the requested attendance records labeled “Franklin Township School Staff Attendance Record” of all full time employees and all members of the administration at Franklin Township School for the period of July 1, 2005 to June 30, 2006 to the Complainant with appropriate redactions. The Custodian must provide a redaction index detailing the nature of the information redacted and the lawful basis of the redactions.**
  4. **The Custodian shall comply with item #3 above within five (5) business days from receipt of the Council’s Interim Order and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, as well as a legal explanation and statutory citation for each redaction, if any, as required under N.J.S.A. 47:1A-6, to the Executive Director.**
  5. As previously decided by the Council on October 31, 2007, because the Custodian failed to include the “Franklin Township School Staff Attendance Record” as a record responsive to the Complainant’s request in the Custodian’s Statement of Information and because the Custodian has not carried her burden of proving a lawful denial of access to the requested attendance records, 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 complaint shall be referred to the Office of Administrative Law for determination of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances. However, the Council defers such referral pending the Custodian’s compliance with the Council’s Interim Order.

Prepared By:

Dara Lownie  
Senior Case Manager

Approved By:

Catherine Starghill, Esq.  
Executive Director

January 23, 2008



## State of New Jersey

### GOVERNMENT RECORDS COUNCIL

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COMMISSIONER LUCILLE DAVY  
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DAVID FLEISHER  
CATHERINE STARGHILL Esq., Executive Director

### INTERIM ORDER

#### October 31, 2007 Government Records Council Meeting

George Burdick  
Complainant

Complaint No. 2007-74

v.

Franklin Township Board of Education (Hunterdon)  
Custodian of Record

At the October 31, 2007 public meeting, the Government Records Council ("Council") considered the October 24, 2007 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. Because the Complainant's request for attendance records specifically identified a government record pursuant to Mag Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super 534, 546 (March 2005), and because the Custodian could have requested clarification from the Complainant regarding his OPRA request pursuant to James Cody v. Middletown Township Public Schools, GRC Complaint No. 2005-98 (December 2005), the Custodian has not borne her burden of proving a lawful denial of access pursuant to N.J.S.A. 47:1A-6.
2. Pursuant to N.J.S.A. 47:1A-6, the Custodian has not carried her burden of proving a lawful denial of access to the requested attendance records because said records are considered payroll records which are subject to public access pursuant to N.J.S.A. 47:1A-10 and Gerald Weimer v. Township of Middletown, GRC Complaint No. 2004-22 (August 2005).
3. The Custodian shall release the requested attendance records labeled "Franklin Township Staff Attendance Record" to the Complainant with appropriate redactions. The Custodian must provide a redaction index detailing the nature of the information redacted and the lawful basis of the redactions.
4. **The Custodian shall comply with item #3 above within five (5) business days from receipt of the Council's Interim Order and simultaneously**



**provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, as well as a legal explanation and statutory citation for each redaction, if any, as required under N.J.S.A. 47:1A-6, to the Executive Director.**

5. Because the Custodian failed to include the “Franklin Township Staff Attendance Record” as a record responsive to the Complainant’s request in the Custodian’s Statement of Information and because the Custodian has not carried her burden of proving a lawful denial of access to the requested attendance records, 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 complaint shall be referred to the Office of Administrative Law for determination of whether the custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.

Interim Order Rendered by the  
Government Records Council  
On The 31<sup>st</sup> Day of October, 2007

Robin Berg-Tabakin, Vice Chairman  
Government Records Council

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

David Fleisher, Secretary  
Government Records Council

**Decision Distribution Date: November 15, 2007**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
October 31, 2007 Council Meeting**

**George F. Burdick, Jr.<sup>1</sup>  
Complainant**

**GRC Complaint No. 2007-74**

v.

**Franklin Township Board of Education (Hunterdon)<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:** Attendance records of all full time employees and all members of the administration at Franklin Township School for the period of July 1, 2005 to June 30, 2006 inclusive.

**Request Made:** February 9, 2007

**Response Made:** February 20, 2007

**Custodian:** Gloria J. Gross

**GRC Complaint Filed:** February 28, 2007

**Background**

**February 9, 2007**

Complainant's Open Public Records Act ("OPRA") request. The Complainant requests the records relevant to this complaint listed above on an official OPRA request form. The Complainant states that in *Weimer v Township of Middletown*, GRC Case # 2004-22<sup>3</sup>, the Council ruled that "[i]t is reasonable that attendance, overtime and compensatory time records are within the realm of payroll records." The Complainant also states that in *Jackson v Kean University*, GRC Case # 2002-98<sup>4</sup>, the Council held that "...a person's name and salary are subject to disclosure under N.J.S.A. 47:1A-10. The requested paid leave of absence information is also subject to disclosure under N.J.S.A. 47:1A-10 as part of an employee's payroll record."

**February 20, 2007**

Custodian's response to the OPRA request. The Custodian responded to the Complainant's OPRA request on the seventh (7<sup>th</sup>) business day following receipt of such request. The Custodian states that access to the requested records is denied pursuant to N.J.S.A. 47:1A-10 because personnel records are considered confidential and are not public records. The Custodian states that there are some exceptions under N.J.S.A.

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

<sup>2</sup> Represented by Thomas O. Johnston, Esq. (Morristown, NJ).

<sup>3</sup> *Gerald Weimer v. Township of Middletown*, GRC Complaint No. 2004-22 (August 2005).

<sup>4</sup> *Janice Jackson v. Kean University*, GRC Complaint No. 2002-98 (February 2004).

47:1A-10 such as an individual's name, title, position, salary, payroll record, length of service, date of separation and reason therefore, and the amount and type of pension received, which are public records. The Custodian also states that in those cases in which the Government Records Council reviewed a public agency's denial of a request for time cards or attendance records, the Council held that the attendance records were public records because under the specific facts of those complaints, the attendance records were part of the employee's payroll record. *Weimer v. Twp. Of Middletown*, 2004-22<sup>5</sup>; *Jackson v. Kean Univ.*, 2002-98<sup>6</sup>. Additionally, the Custodian states that attendance records are not kept as part of the payroll records in the normal course of business for the Franklin Township Board of Education unless compensation was reduced for non-attendance and therefore the requested records are not public records and cannot be produced.

### **February 28, 2007**

Denial of Access Complaint filed with the Government Records Council ("GRC") with the following attachments:

- Complainant's OPRA request dated February 9, 2007 and
- Custodian's response to the OPRA request dated February 20, 2007.

The Complainant states that he submitted his OPRA request on February 9, 2007 along with excerpts from the following prior GRC decisions: *Jackson v Kean University (GRC Case # 2002-98)*<sup>7</sup> and *Weimer v Township of Middletown (GRC Case # 2004-22)*<sup>8</sup>. The Complainant states that in his OPRA request, he requested that the Custodian provide legal decisions or citations if the request is denied to establish the basis for the denial. The Complainant states that the Custodian denied his OPRA request on February 20, 2007 on the basis that attendance records are part of the Board of Education's personnel records.

The Complainant states that N.J.S.A. 47:1A-5.g. places the burden on the Custodian to state the specific reason for a denial of access. Additionally, the Complainant states that N.J.S.A. 47:1A-6 mandates that the public agency shall have the burden of proving that the denial of access is authorized by law. The Complainant states that in *Jackson*, the GRC held that attendance records of any public employee in the State of New Jersey are part and parcel of payroll records, and as such, are not exempt from public disclosure. The Complainant also states that in *Weimer*, the GRC held that attendance records of any public employee in the State of New Jersey (previously deemed public records under *Jackson*) are not exempt from public disclosure regardless of the potential location of the record, even if those records are held in personnel files.

The Complainant asserts that the Custodian has failed to bear her burden of proving a lawful denial of access to the requested attendance reports. The Complainant

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<sup>5</sup> *Gerald Weimer v. Township of Middletown*, GRC Complaint No. 2004-22 (August 2005).

<sup>6</sup> *Janice Jackson v. Kean University*, GRC Complaint No. 2002-98 (February 2004).

<sup>7</sup> *Janice Jackson v. Kean University*, GRC Complaint No. 2002-98 (February 2004).

<sup>8</sup> *Gerald Weimer v. Township of Middletown*, GRC Complaint No. 2004-22 (August 2005).

requests that the GRC find that the requested reports are not exempt and should be provided to the Complainant without delay.

**March 13, 2007**

Offer of Mediation sent to both parties.

**March 13, 2007**

The Complainant declines mediation and requests that the GRC begin a full investigation of this complaint. The Custodian also did not agree to mediate this complaint.

**March 14, 2007**

Request for the Statement of Information sent to the Custodian.

**March 19, 2007**

Letter of Representation from Custodian's Counsel.

**March 28, 2007**

Custodian's Statement of Information ("SOI") with the following attachments:

- Complainant's OPRA request dated February 9, 2007 and
- Custodian's response to the OPRA request dated February 20, 2007.

The Custodian certifies receiving the Complainant's OPRA request on February 9, 2007. The Custodian certifies responding to the Complainant's request via letter dated February 20, 2007 in which the Custodian advised the Complainant that attendance records are not utilized for payroll purposes in the normal course of business, unless compensation is reduced for non-attendance, thus the requested records are not considered public records and cannot be produced. The Custodian certifies that in addition to the employee's name and dates of absences, the requested attendance records contain information relating to whether the employee is absent due to personal illness, personal reasons, death in the immediate family or death of a friend.

The Custodian asserts that the Complainant's contention that all attendance records are public records is incorrect. The Custodian states that pursuant to N.J.S.A. 47:1A-10, personnel records are excluded from the definition of a government record because of their confidential nature. The Custodian refers to *Fenichel v. Ocean City Bd. Of Educ.*, GRC 2002-82 (Jan. 31, 2003)<sup>9</sup> in which the Council held that personnel information is exempt from public access and therefore confidential. Additionally, the Custodian states that OPRA's provision exempting personnel records from public access also provides the following three (3) categories of information that must be disclosed upon request:

1. An individual's name, title, position, salary, payroll record, length of service, date of separation and the reason therefor, and the amount and type of any pension received shall be a government record;

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<sup>9</sup> Steven Fenichel v. Ocean City Board of Education, GRC Complaint No. 2002-82 (January 2003).  
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2. Personnel or pension records of any individual shall be accessible when required to be disclosed by another law, when disclosure is essential to the performance of official duties of a person duly authorized by this State or the United States, or when authorized by an individual in interest; and
3. Data contained in information which disclose conformity with specific experiential, educational or medical qualifications required for government employment or for receipt of a public pension, but not including any detailed medical or psychological information, shall be a government record. N.J.S.A. 47:1A-10.

The Custodian certifies that the requested attendance records are personnel records because said records identify a specific government employee and are maintained as part of that employee’s personnel file. The Custodian certifies that attendance records are not included in any of the records enumerated above and asserts that if the Legislature intended to include attendance records as public records, it could have.

Further, the Custodian contends that the Complainant’s reliance on Jackson is misplaced because the requestor in that complaint was not seeking attendance records of all employees, but instead sought names of Kean University employees who were granted paid leaves of absence, the dates of the leaves, the employee’s regular salary and the salary during the leave of absence.

The Custodian certifies that the Board of Education (“BOE”) maintains Employee Absence Reports that are completed by employees when they take time off. The Custodian certifies that to the extent that the Complainant seeks attendance records for employees that affect compensation, the BOE will produce such records, subject to appropriate redactions. The Custodian asserts that the requested records are also protected under the common law right of access. Moreover, the Custodian contends that the Complainant’s assertion that all attendance records are public records is without merit and requests that this complaint be dismissed.

Additionally, the Custodian provides the following document index regarding the records responsive to the Complainant’s request:

<b>List of all records responsive to Complainant’s OPRA request (including the number of pages)</b>	<b>List all records provided to Complainant, in their entirety or with redactions (include dates such records were provided)</b>	<b>If records were disclosed with redactions, give a general nature description of the redactions.</b>	<b>If records were denied in their entirety, give a general nature description of the record.</b>	<b>List the legal explanation and statutory citation for the denial of access (including for redactions) as required under <u>N.J.S.A. 47:1A-6.</u></b>
Employee Absence	None	N/A	Employee Absence	Exempt as personnel

Reports			Reports	records pursuant to <u>N.J.S.A. 47:1A-10</u> .
June Staff Absence Report (2 pages)	None	N/A	June Staff Absence Report	Exempt as personnel records pursuant to <u>N.J.S.A. 47:1A-10</u> .

**April 4, 2007**

The Complainant’s response to the Custodian’s SOI. The Complainant contends that there are three (3) issues to be decided in this complaint:

1. Does the Franklin Township School/Board of Education maintain attendance records for all full time employees and members of the administration in its normal course of business?
2. If so, are those attendance records exempt from public disclosure?
3. Has the Custodian met her burden of proving that the denial of access is authorized by law?

Does the Franklin Township School/Board of Education maintain attendance records for all full time employees and members of the administration in its normal course of business?

The Complainant claims that the “Benefits” clause in the individual employment contracts for Franklin Township School employees specifies the amount of paid days allotted for personal illness, personal leave, bereavement leave and school business. The Complainant claims that records must be maintained for each employee to ensure that each employee is provided with the appropriate amount of paid days. The Complainant states that the Custodian admitted to maintaining such records in her Statement of Information dated March 28, 2007 when she stated “[i]n addition to the employee’s name and dates of absences, the subject attendance records set forth whether the employee is absent due to personal illness, personal reasons, death in the immediate family or death of a friend.”

The Complainant states that he has attached a Franklin Township School (FTS) Staff Attendance Record which the Complainant claims is maintained and recorded for each employee of the FTS. The Complainant contends that if an employee absence is identified on said record, the letters “PI” indicate that the absence relates to personal illness, “PB” indicates personal business, “SB” indicates school business and “D” indicates bereavement leave. The Complainant claims that if an employee is docked for non-attendance, a double asterisk would be marked next to the letters identified above. The Complainant asserts that the BOE/FTS maintain Staff Attendance Records in the normal course of business.

Are those attendance records exempt from public disclosure?

The Complainant contends that the Custodian's reliance on Fenichel, the only GRC decision the Custodian cited as a legal citation for the denial of access, fails to establish a burden of proof to the denial of access in this complaint.

The Complainant refers to the GRC's ruling in Jackson in support of his position that attendance records are public records. Specifically, the Complainant states that in Jackson, the GRC held that:

[a]ssuming for purposes of this request that the requested leave of absence information is a personnel record, a reasonable interpretation of the relevant law allows for disclosure of the requested information under the payroll records exception to the confidentiality of personnel records. Specifically, a person's name and salary are subject to disclosure under N.J.S.A. 47:1A-10. The requested paid leave of absence information is also subject to disclosure under N.J.S.A. 47:1A-10 as part of an employee's payroll record....

The Complainant also refers to the GRC's decision in Weimer in which the Council ruled that:

[i]t is reasonable that the attendance, overtime and compensatory time records are within the realm of payroll records. As indicated by the Custodian, attendance, overtime and compensatory time may be contained in an officer's personnel file, however, should not be considered exempt under the 'personnel and pension' provision of OPRA. The content of the record is applicable in this case and not the potential location of the record.

Additionally, the Complainant states that in Renna v. County of Union, GRC Case No. 2005-137 (decision effective December 8, 2005),<sup>10</sup> the Custodian provided the requestor with the requested list of vacation days, personal days, sick days and floating holidays.

Based on the above, the Complainant asserts that the Custodian's contention that the requested records are confidential in nature and statutorily exempt from disclosure is false and without merit.

Has the Custodian met her burden of proving that the denial of access is authorized by law?

The Complainant contends that if prior GRC decisions resulted in attendance records for public employees being provided to the requestors, it can be concluded that the release of attendance records is authorized by law. As such, the Complainant asserts that there is no legal basis for the Custodian to claim any exemption to public disclosure.

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<sup>10</sup> Tina Renna v. County of Union, GRC Complaint No. 2005-137 (December 2005).

Additionally, the Complainant states that in the Custodian's document index, Employee Absence Reports and June Staff Absence Report are listed as records responsive to the request. The Complainant states that he did not request such records. The Complainant states that he requested attendance records of all full time employees and all members of the administration for the period of July 1, 2005 to June 30, 2006 inclusive.

#### **April 12, 2007**

Letter from Custodian's Counsel to GRC. Counsel states that the Complainant fails to explain the means by which he obtained the alleged attendance record attached to his April 4, 2007 correspondence to the GRC. Counsel also states that contrary to the Complainant's assertion, the personnel records that reflect attendance contain confidential information relative to the BOE's employees. As such, Counsel contends that said records should be protected from disclosure in order to avoid infringing on an individual's rights to privacy. Counsel states that to the extent that the Complainant seeks absence reports for employees whose specific absences impacted their compensation, the BOE will provide such documents, subject to appropriate redactions.

#### **April 17, 2007**

Letter from Complainant to GRC. The Complainant states that he is under no obligation to describe how he acquired the Franklin Township School Staff Attendance Record. The Complainant asserts that the Custodian Counsel's remarks on said matter confirm that such form exists.

#### **June 25, 2007**

Letter from GRC to Custodian's Counsel. GRC requests that the Custodian respond to the following in the form of a legal certification:

1. Indicate whether the Franklin Township BOE/FTS maintains the Franklin Township School Staff Attendance Record for the 2005-2006 school year (provided to the GRC by the Complainant in his letter dated April 4, 2007.)
2. If said record is maintained on file, indicate whether said record was utilized by the Franklin Township BOE/FTS employees and administrators during the period of July 1, 2005 through June 30, 2006. If so, indicate whether the Franklin Township BOE/FTS maintains the completed attendance records for the 2005-2006 school year of all FTS employees and administrators.
3. If the alleged Franklin Township Staff Attendance Record for the 2005-2006 school year is maintained on file with the Franklin Township BOE/FTS and was utilized by Franklin Township BOE/FTS employees and administrators during the 2005-2006 school year, provide the legal explanation and statutory citation for the denial of access based on a public agency's burden of proving that denials of access are authorized by law pursuant to N.J.S.A. 47:1A-6.

#### **June 27, 2007**

Custodian's certification in response to GRC's request. The Custodian certifies that the spreadsheet labeled "Exhibit A" (Franklin Township School Attendance Record), attached to the GRC's letter dated June 25, 2007 is comparable to the record maintained by the BOE. The Custodian certifies that the Superintendent/Building Principal

maintains these attendance records. The Custodian certifies that the attendance records are maintained solely for personnel purposes, not for payroll purposes. The Custodian certifies that no attendance records are utilized or kept for payroll purposes. The Custodian also certifies that attendance records similar to Exhibit A are maintained for the purpose of calculating available vacation and sick days for staff as well as for generally keeping track of staff members. The Custodian certifies that at the end of the school year, the spreadsheets are placed in staff personnel folders. Additionally, the Custodian certifies that the basis for the BOE's denial of the Complainant's request is that any attendance records kept by the BOE are part of an employee's personnel file and are not utilized or maintained for payroll purposes. Therefore, the Custodian contends that the attendance records are exempt from disclosure under N.J.S.A. 47:1A-10.

### **July 2, 2007**

Letter from Complainant to GRC. The Complainant asserts that the Custodian's statement that attendance records are not utilized or kept for payroll purposes is in conflict with the Custodian's certification dated March 28, 2007 in which the Custodian certified that the BOE does not keep attendance records for payroll purposes in the normal course of business, unless compensation of an individual employee has been reduced for non-attendance. The Complainant contends that it is unbelievable that the BOE/FTS would not maintain any attendance records for the benefit of payroll or compensation purposes.

The Complainant asserts that the Custodian's certification implies that the attendance spreadsheets continue to exist, be maintained and utilized. The Complainant contends that if a link can be made between vacation or sick days and payroll or compensation for any staff member, then the spreadsheets are used for payroll or compensation purposes by the BOE/FTS. Additionally, the Complainant asserts that pursuant to BOE contracts, staff and administrators can be paid for unused sick or vacation time. The Complainant contends that there is evidence to indicate that the Custodian made willfully false statements in her June 27, 2007 certification to the GRC.

The Complainant also states that in the Custodian Counsel's cover letter dated June 27, 2007, Counsel asserted that the attendance spreadsheets do not indicate whether a particular absence was or was not compensated. The Complainant disagrees with Counsel's statement because the Custodian certifies that the attendance spreadsheet is maintained and utilized by the BOE/FTS but does not refute the Complainant's explanation on how these records are filled out by employees. The Complainant contends that this is consistent with the Custodian's certification indicating that attendance records are not kept unless compensation of an individual employee was reduced for non-attendance.

The Complainant requests that the GRC order the Custodian to release the requested records without redactions.

### **July 13, 2007**

Letter from GRC to Complainant. The GRC states that the purpose of this letter is to summarize the topics discussed during a conference call which took place on July 11, 2007 with the Custodian's Counsel. The GRC states that the purpose of the

conference call was to clarify the contested facts of the complaint so that the GRC can properly adjudicate said complaint. The GRC states that the conference call resulted in the Custodian's Counsel agreeing to provide the GRC with written clarification regarding the inconsistency between the initial denial of access and the current offer to release certain responsive records.

**July 13, 2007**

E-mail from Complainant to GRC. The Complainant states that his original OPRA request was for the record labeled "Franklin Township School Staff Attendance Record."

**July 13, 2007**

Letter from Custodian's Counsel to GRC. Counsel objects to the manner in which the GRC presented the summary of the July 11, 2007 conference call because Counsel asserts that he understood the call to be for settlement discussions, not clarification as the GRC stated in its letter to the Complainant dated July 13, 2007. Counsel contends that his statements should not be relied upon by the GRC in making a determination in this complaint because said statements were made for the purposes of advancing settlement. See N.J.R.E. 408, see also *Brown v. Pica*, 360 N.J. Super. 565, 570 (Law Div. 2001).

Counsel states that the Complainant's request was for the attendance records of all full time employees and administrators at the Franklin Township School from July 1, 2005 though June 30, 2006. Counsel states that the Custodian's response to the Complainant indicated that attendance records are not *per se* payroll records and that attendance records are not kept by the BOE as part of payroll records in the normal course of business unless compensation was reduced for non-attendance. Thus, Counsel states the Custodian denied the Complainant's request, which Counsel asserts is a broad request for all attendance records.

Counsel also states that the BOE identified two (2) records that might be responsive to the Complainant's request which are Employee Absence Reports and June Staff Absence Report. Counsel states that the Staff Attendance Record, which was submitted to the GRC by the Complainant, was not listed as a record responsive to the request because said report contains the same information as the June Staff Absence Report, just in a different format.

Counsel states that the Employee Absence Reports are used to document when an employee has taken the day off. Counsel asserts that these records are not subject to disclosure because they contain personal and confidential information of the BOE's employees, such as the reason for the employee's absence. Counsel states that the only time said records are transmitted to the payroll department is when an employee's absence requires that the BOE make a deduction from his/her salary.

Regarding the Staff Attendance Records submitted to the GRC by the Complainant, Counsel states that the Superintendent of Schools and/or her assistant maintain said records, which Counsel asserts are maintained solely for personnel purposes and do not contain any payroll information.

Additionally, Counsel states that the June Staff Absence Report, which is maintained by the Superintendent of Schools and/or her assistant, is not utilized for payroll purposes and contains the same information as the Staff Attendance Records. Counsel states that the June Staff Absence Report is a compilation of all the Staff Attendance Records. Counsel also states that the June Staff Absence Report contains personal information of BOE employees such as the reason for the employee's absence.

Further, Counsel states that he advised the Complainant several times that the BOE will produce attendance records that were used for payroll purposes, if the Complainant seeks such records. However, Counsel states that the BOE could not honor the Complainant's broad request for all attendance records. Counsel states that in Bent v. Twp. Of Stafford, 381 N.J. Super. 30 (App. Div. 2005), the court held that "to qualify under OPRA...the request must reasonably identify a record..." Counsel also states that in Mag Entertainment, LLC v. Div. Of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005), the court ruled that agencies are only required to disclose identifiable government records. Counsel states that the court held that "OPRA does not countenance open-ended searches of an agency's files." Counsel asserts that in this Complainant, the Complainant did not submit a request for an identifiable record and that it was the Custodian's responsibility to determine whether the Complainant wanted payroll records which reflected paid days off.

Counsel further states that it is clear that the Complainant seeks only the Staff Attendance Records which Counsel contends are not maintained or utilized for the purposes of payroll and thus are not public records. Counsel also asserts that if the GRC finds that the Custodian unlawfully denied access, the GRC should also find that the Custodian did not willfully and intentionally violate OPRA by denying access to the records at issue.

#### **August 23, 2007<sup>11</sup>**

Letter from GRC to Custodian's Counsel. The GRC states that as was specifically stated in the initial telephone conversation between Counsel and the GRC on July 3, 2007, the GRC scheduled the conference call to obtain clarity of what appears to be conflicting statements or information provided by the Custodian regarding the records at issue in this complaint. The GRC states that it was never the intent of the GRC to conduct intervention during the scheduled conference call. The GRC also states that it began the conference call by asking whether the Custodian was willing to disclose the records at issue in an effort to settle the matter, as was previously stated by Counsel in an earlier telephone conversation between Counsel and the GRC. The GRC states that said question was necessary because the remainder of the conference call would have been unnecessary if the Custodian was willing to disclose the particular record at issue and the Complainant was satisfied by such action and chose to withdraw the complaint.

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<sup>11</sup> Additional correspondence was submitted by the parties; however, said correspondence either restates facts and assertions already presented to the GRC or does not provide the GRC with any clarification regarding the records at issue in this complaint.

## Analysis

### **Whether the Custodian unlawfully denied access to the requested attendance records?**

OPRA provides that:

“...government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, *with certain exceptions...*” (Emphasis added.) N.J.S.A. 47:1A-1.

Additionally, OPRA defines a government record 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 ... or that has been received* in the course of his or its official business ...” (Emphasis added.) N.J.S.A. 47:1A-1.1.

OPRA places the onus on the Custodian to prove that a denial of access is lawful. Specifically, OPRA states:

“...[t]he public agency shall have the burden of proving that the denial of access is authorized by law...” N.J.S.A. 47:1A-6.

OPRA also states that:

“[n]otwithstanding the provisions of [OPRA]... *the personnel or pension records of any individual in the possession of a public agency ... shall not be considered a government record* and shall not be made available for public access, *except that* an individual's name, title, position, *salary, payroll record*, length of service, date of separation and the reason therefor, and the amount and type of any pension received *shall be a government record...*” (Emphasis added). N.J.S.A. 47:1A-10.

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. 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.

The Custodian’s Counsel asserts that the Custodian denied the Complainant’s OPRA request because the Complainant did not submit a request for an identifiable government record and that it was the Custodian’s responsibility to determine whether the Complainant wanted payroll records which reflected paid days off. Counsel contends that the Complainant’s request is a broad request for all attendance records.

The New Jersey Superior Court has held that "[w]hile 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." (Emphasis added.) Mag Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super 534, 546 (March 2005). 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." (Emphasis added.) *Id.* at 549.

Further, in Bent v. Stafford Police Department, 381 N.J. Super 30, 37 (October 2005)<sup>12</sup>, the Superior Court references Mag in that the Court held that a requestor must specifically describe the document sought because OPRA operates to make identifiable government records "accessible." "As such, a proper request under OPRA must identify with reasonable clarity those documents that are desired, and a party cannot satisfy this requirement by simply requesting all of an agency's documents."<sup>13</sup>

In this complaint, the Complainant requested "attendance records of all full time employees and all members of the administration at Franklin Township School for the period of July 1, 2005 to June 30, 2006 inclusive." In an e-mail to the GRC dated July 13, 2007, the Complainant specified that the records he is seeking are labeled "Franklin Township School Staff Attendance Record." The Complainant had previously supplied a blank copy of said record to the GRC on April 4, 2007. Additionally, the Custodian certified on June 27, 2007 that the BOE maintains an attendance record comparable to the one submitted to the GRC by the Complainant. Because the Complainant identified a specific time period and the specific wording of the request is for "attendance records" and the records being sought are entitled "Franklin Township School Staff *Attendance Record*" (Emphasis added), it appears as though the Complainant did request an identifiable government record pursuant to Mag.

Additionally, the GRC had previously ruled on whether a custodian's request for clarification results in a denial of access. In James Cody v. Middletown Township Public Schools, GRC Complaint No. 2005-98 (December 2005), the Custodian required clarification from the Complainant regarding the Complainant's OPRA request because said request was broad or unclear. The Council held that "[i]n the case of the records that needed clarification, there is no denial of access to records because the Custodian did properly respond to those requests in writing within the statutorily required seven (7) business days, indicating to the Complainant that clarification was necessary but did not receive a response in return from the Complainant."

Therefore, because the Complainant's request for attendance records specifically identified a government record pursuant to Mag Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super 534, 546 (March 2005), and because the

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<sup>12</sup> Affirmed on appeal regarding Bent v. Stafford Police Department, GRC Case No. 2004-78 (October 2004).

<sup>13</sup> As stated in Bent.

Custodian could have requested clarification from the Complainant regarding his OPRA request pursuant to James Cody v. Middletown Township Public Schools, GRC Complaint No. 2005-98 (December 2005), the Custodian has not borne her burden of proving a lawful denial of access pursuant to N.J.S.A. 47:1A-6.

Further, OPRA provides that “...*the personnel or pension records of any individual in the possession of a public agency ... shall not be considered a government record* and shall not be made available for public access, *except that an individual's name, title, position, salary, payroll record, length of service, date of separation and the reason therefor, and the amount and type of any pension received shall be a government record...*” (Emphasis added). N.J.S.A. 47:1A-10.

In Gerald Weimer v. Township of Middletown, GRC Complaint No. 2004-22 (August 2005), the Complainant sought attendance records of a government employee. The Council held that:

[i]t is reasonable that attendance, overtime and compensatory time records are within the realm of payroll records. As indicated by the Custodian, attendance, overtime and compensatory time may be contained in an officer's personnel file, however, should not be considered exempt under the 'personnel and pension' provision of OPRA. The content of the record is applicable in this case and not the potential location of the record.

The facts of this complaint are similar to those in Weimer. The Custodian's Counsel states that the BOE identified two (2) records that might be responsive to the Complainant's request which are Employee Absence Reports and June Staff Absence Report. Counsel states that the Staff Attendance Record, which was submitted to the GRC by the Complainant, was not listed as a record responsive to the request because said report contains the same information as the June Staff Absence Reports, just in a different format. It should be noted that on the Statement of Information form, Custodians are instructed to list all records responsive to the Complainant's OPRA request. The Custodian certifies that the requested attendance records are personnel records which are exempt under N.J.S.A. 47:1A-10 because said records identify a specific, individual government employee and are maintained as part of that employee's personnel file.

Therefore, pursuant to N.J.S.A. 47:1A-6, the Custodian has not carried her burden of proving a lawful denial of access to the requested attendance records because said records are considered payroll records which are subject to public access pursuant to N.J.S.A. 47:1A-10 and Weimer. As such, the Custodian should release the requested attendance records labeled “Franklin Township Staff Attendance Record” to the Complainant with appropriate redactions. The Custodian must provide a redaction index detailing the nature of the information redacted and the lawful basis of the redactions.

**Whether the Custodian’s delay in access to the requested records rises to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances?**

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:

“... If 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 at 185 (2001)); the Custodian must have had some knowledge that his actions were wrongful (Fielder v. Stonack, 141 N.J. 101, 124 (1995)); the Custodian’s actions must have had a positive element of conscious wrongdoing (Berg v. Reaction Motors Div., 37 N.J. 396, 414 (1962)); the Custodian’s actions must have been forbidden with actual, not imputed, knowledge that the actions were forbidden (Berg); the Custodian’s actions must have been intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional (ECES v. Salmon, 295 N.J. Super. 86 (App. Div. 1996) at 107).

On February 9, 2007 the Complainant requested attendance records of all full time employees and administrators at the Franklin Township School for a specific period of time. The Custodian certifies that the BOE maintains records labeled “Franklin Township Staff Attendance Record.” The Custodian’s Counsel states that the Staff Attendance Report, which was submitted to the GRC by the Complainant, was not listed as a record responsive to the request because said report contains the same information as the June Staff Absence Reports, just in a different format. Based on Counsel’s statement above, it appears as though the Custodian was aware of the existence of the requested Staff Attendance Records and chose to not include said record as a record responsive to the request in the Custodian’s Statement of Information. It should be noted that on the Statement of Information form, Custodians are instructed to list all records responsive to the Complainant’s OPRA request.

Because the Custodian failed to include the “Franklin Township Staff Attendance Record” as a record responsive to the Complainant’s request in the Custodian’s Statement of Information and because the Custodian has not carried her burden of proving a lawful denial of access to the requested attendance records, 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 complaint should be referred to the Office of Administrative Law for determination of whether the custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. Because the Complainant’s request for attendance records specifically identified a government record pursuant to Mag Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super 534, 546 (March 2005), and because the Custodian could have requested clarification from the Complainant regarding his OPRA request pursuant to James Cody v. Middletown Township Public Schools, GRC Complaint No. 2005-98 (December 2005), the Custodian has not borne her burden of proving a lawful denial of access pursuant to N.J.S.A. 47:1A-6.
2. Pursuant to N.J.S.A. 47:1A-6, the Custodian has not carried her burden of proving a lawful denial of access to the requested attendance records because said records are considered payroll records which are subject to public access pursuant to N.J.S.A. 47:1A-10 and Gerald Weimer v. Township of Middletown, GRC Complaint No. 2004-22 (August 2005).
3. The Custodian shall release the requested attendance records labeled “Franklin Township Staff Attendance Record” to the Complainant with appropriate redactions. The Custodian must provide a redaction index detailing the nature of the information redacted and the lawful basis of the redactions.
4. **The Custodian shall comply with item #3 above within five (5) business days from receipt of the Council’s Interim Order and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, as well as a legal explanation and statutory citation for each redaction, if any, as required under N.J.S.A. 47:1A-6, to the Executive Director.**
5. Because the Custodian failed to include the “Franklin Township Staff Attendance Record” as a record responsive to the Complainant’s request in the Custodian’s Statement of Information and because the Custodian has not carried her burden of proving a lawful denial of access to the requested attendance records, 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 complaint shall be referred to the Office of Administrative Law for determination of whether the custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.

Prepared By:

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Approved By:

Catherine Starghill, Esq.  
Executive Director

October 24, 2007