

Before the School Ethics Commission
Docket No.: C08-21
Decision on Motion to Dismiss

Tyrone Jon Tarver,
Complainant

v.

Jeffrey Wingfield,
Orange Board of Education, Essex County,
Respondent

I. Procedural History

This matter arises from a Complaint that was filed on April 1, 2021, by Tyrone Jon Tarver (Complainant), a former member of the Orange Board of Education (Board), alleging that Jeffrey Wingfield (Respondent), a current member of the Board, violated the School Ethics Act (Act), *N.J.S.A.* 18A:12-21 et seq. More specifically, the Complaint posits that Respondent violated *N.J.S.A.* 18A:12-24.1(c) (in Count 1, Count 4, and Count 7), violated *N.J.S.A.* 18A:12-24.1(e) (in Count 2, Count 5, and Count 8), and violated *N.J.S.A.* 18A:12-24.1(g) (in Count 3, Count 6, and Count 9) of the Code of Ethics for School Board Members (Code).

On April 6, 2021, the Complaint was served on Respondent, via electronic mail, notifying him that charges were filed against him with the School Ethics Commission (Commission), and advising that he had twenty (20) days to file a responsive pleading.¹ On May 26, 2021, Respondent filed a Motion to Dismiss in Lieu of Answer (Motion to Dismiss), and also alleged that the Complaint is frivolous. On June 30, 2021, Complainant filed a response to the Motion to Dismiss and allegation of frivolous filing.

The parties were subsequently notified by correspondence dated July 19, 2021, that this matter would be placed on the Commission's agenda for its meeting on July 27, 2021, in order to make a determination regarding the Motion to Dismiss and allegation of frivolous filing. At its meeting on July 27, 2021, the Commission considered the filings in this matter and, at its special meeting on August 30, 2021, the Commission voted to grant the Motion to Dismiss because the Complaint was untimely filed. The Commission also voted to find the Complaint not frivolous, and to deny Respondent's request for sanctions.

¹ Due to the ongoing Coronavirus (COVID-19) pandemic, service of process was effectuated by the Commission through electronic transmission only.

II. Summary of the Pleadings

A. The Complaint

The following facts apply to Counts 1–3: on August 25, 2020, Respondent forwarded a “confidential email” from Complainant (then Board President) to Dwayne D. Warren, the Orange Township Mayor (Mayor Warren), without the Board’s knowledge. Respondent’s conduct was discovered when “a subsequent and sudden email” was sent by Mayor Warren to Complainant, other members of the Board, Board counsel, the Superintendent, and the Board Secretary, and included “the original confidential email ... to which the Mayor should not have had any access.” The first statement made by the Mayor was that he “reviewed the contents of [the] confidential email.” The Mayor’s email then detailed “unfounded accusations and insults” directed at Complainant – conduct which, according to Complainant, “has been repetitive and ongoing” since Complainant founded a 2017 Petition Committee, and “cosponsored the successful 2017 Orange BOE Reclassification Referendum” (in which voters elected to change from a Type I Board (Mayor-appointed) to a Type II Board (citizen elected)).

Respondent subsequently “acknowledged that he did in fact forward the” email to the Mayor, but claimed it was “*unintentional* and ... that the matter was settled.” Although Complainant requested an investigation, he is not aware whether an investigation actually occurred, only that Board counsel “made the decision to label this incident as ‘unintentional’ and ‘rectified.’” In addition, although Complainant has asked, by way of Open Public Records Act (OPRA) requests, for all emails between Respondent and the Mayor, including the one that was sent on August 25, 2020, he has only received “some.” The “refusal to provide the original email” leads Complainant to disagree “with this conclusion of inadvertent or ‘unintentional.’”

Complainant notes that although it was his intention to file this Complaint within the 180-day timeline, which was February 21, 2021, he was unable to obtain the necessary emails while he was a Board member/President. When Complainant’s “tenure as a Board [m]ember ended in 2020,” he filed the January 11, 2021, OPRA request, which he notes was well before the 180-day timeline. Although Complainant received responses to his request (as late as February 15, 2021), the complete and intact emails crucial to this complaint were never delivered to Complainant, or incomplete emails were never corrected and forwarded ... by the” Board’s Custodian of Records and/or Board counsel.

Based on the information above, and in Count 1, Complainant asserts that Respondent violated *N.J.S.A.* 18A:12-24.1(c) because Respondent took action that was unrelated to his duties as a Board member and, as a Board member for more than five years, he “should absolutely have known better and that forwarding confidential email was totally out of bounds regarding the duties and ethics of a Board [m]ember.” In Count 2, Complainant contends that Respondent violated *N.J.S.A.* 18A:12-24.1(e) because by forwarding confidential email, Respondent took action beyond the scope of his duties such that, by its nature, had the potential to compromise the Board. Complainant further contends that Respondent’s “private action was selfish, unacceptable and against the duties” of a Board member, and prompted “unwarranted and unfounded claims” against Complainant. In Count 3, Complainant alleges Respondent violated *N.J.S.A.* 18A:12-24.1(g) because he forwarded a confidential communication to parties outside the Board, and “not using the perceived better judgment of a ... Board member with years of experience and

training [not to] forward a confidential communication between a Board President and [Board] Counsel to other outside parties is completely unacceptable.”

The following facts relate to Counts 4–6: on September 25, 2020, a “second confidential email was again improperly forwarded” from Respondent to the Mayor; Adrienne Wooten, Orange Township Councilperson (Councilperson Wooten); and Avram White, Orange Township Corporation Counsel (Counsel White). The forwarded email contained “a confidential email exchange between Complainant ... and Board Counsel.” Complainant first learned of this disclosure when he received records responsive to his January 11, 2021, OPRA request (the records were received on January 23, 2021).

After the September 25, 2020, email, Board counsel sent an email to Councilperson Wooten stating, “it is clear that you were forwarded [a] confidential communication” and “this email ‘should not have been shared with you.’” According to Complainant, Respondent’s “refusal to acknowledge his part in forwarding this email additionally resulted in an unfortunate reply directed towards Board counsel by Councilperson Wooten.”

With the above in mind, and in Count 4, Complainant asserts that Respondent violated *N.J.S.A.* 18A:12-24.1(c) because Respondent took action that was unrelated to his duties as a Board member when, “knowing that forwarding confidential communications was not proper, [Respondent] repeated this act for a second time by forwarding email communications to three email recipients who were not privy to [Orange Public Schools District (District)] internal communications.” According to Complainant, Respondent’s “brazen actions are repetitive and inexcusable.” In Count 5, Complainant contends Respondent violated *N.J.S.A.* 18A:12-24.1(e) because by forwarding a confidential email “a second time, Respondent took action beyond the scope of his duties such that, by its nature, had the potential to compromise the Board.” Per Complainant, Respondent’s private action was “selfish, unacceptable and against the duties of what each [B]oard member has sworn to do as a government elected official.” In Count 6, Complainant maintains that Respondent violated *N.J.S.A.* 18A:12-24.1(g) because he forwarded a confidential communication between the Board President and Board attorney to outside parties. As argued by Complainant, “not using the perceived better judgment” of a Board member with years of experience and training “is completely unacceptable.”

The following facts concern Counts 7–9: as a result of his (Complainant’s) January 11, 2021, OPRA request, Complainant learned that “only three days after the second incident,” or on September 28, 2020, “a third confidential email was again improperly forwarded” by Respondent to the Mayor, Councilperson Wooten, and Counsel White. The forwarded email contained communications between Complainant (as Board President) and other members of the Board. In his transmission of the confidential email, Respondent stated, “Tarver response to [Board Member] Johnson,” and Respondent also forwarded the email to his work email address. As with the second incident on September 25, 2020, Complainant did not learn of this third incident until he received records responsive to his January 11, 2021, OPRA request (on January 23, 2021).

Based on this information, Complainant contends, in Count 7, that Respondent violated *N.J.S.A.* 18A:12-24.1(c) because Respondent took action that was unrelated to his duties as a Board member when he knowingly forwarded a confidential Board communication “for a third time within a four week timespan” to three email recipients who were not Board members, and

not “privy to internal communications.” In Count 8, Complainant asserts Respondent violated *N.J.S.A.* 18A:12-24.1(e) because by forwarding a confidential communication a “third time,” Respondent took action beyond the scope of his duties such that, by its nature, had the potential to compromise the Board. As argued above, such action is selfish, unacceptable, and contrary to what is expected of a Board member. In Count 9, Complainant maintains that Respondent violated *N.J.S.A.* 18A:12-24.1(g) because despite “years of experience and training,” Respondent forwarded “a confidential communication” between Complainant (the Board President) and Board counsel to “other outside parties.” Such action, per Complainant, is “completely unacceptable.”

B. Motion to Dismiss and Allegation of Frivolous Filing

Following receipt of the Complaint, Respondent filed a Motion to Dismiss and allegation of frivolous filing. Respondent initially argues that Complainant “has been a longtime vocal critic” of Mayor Warren, who also happens to be Respondent’s cousin. For example, in 2018, Complainant “ran an unsuccessful campaign to recall Mayor Warren.” In addition, in 2019 and 2020, “... Complainant frequently used social media to post accusations and criticism of Mayor Warren and his administration.”

With regard to Counts 1–3, Respondent asserts, “Complainant’s exhibits are entirely devoid of any Complainant-authored email dated on or before [August 25, 2020], despite Complainant admitting possession of same as the author and as the alleged recipient of same as an attachment to Mayor Warren’s response.” Complainant’s exhibits are “further devoid of any documentation demonstrating that any such email was ‘confidential,’ or any documentation demonstrating that Respondent forwarded any such email to Mayor Warren.” Furthermore, the August 25, 2020, email – “Re: Message from Ms. Kleen” – does not reference Respondent other than including Respondent as a recipient. Therefore, and “[i]n the absence of the substantive contents of the alleged email and proof that Respondent forwarded same to Mayor Warren, Complainant is unable to demonstrate that Respondent took board action unrelated to his duties, took private action with the potential to compromise the [B]oard, or disclosed confidential information.”

As for Counts 4–6, Respondent submits, “Complainant’s exhibits omit the actual text of the allegedly ‘confidential’ [September 25, 2020], email forwarded by Respondent to Mayor Warren, Councilperson Wooten, and [Counsel] White, despite the fact that Complainant indisputably possesses the text of the original email, as he is listed as the author of the same.” Therefore, and “[i]n the absence of the substantive contents of the referenced email, Complainant is unable to demonstrate that Respondent took board action unrelated to his duties, took private action with the potential to compromise the [B]oard, or disclosed confidential information.”

Regarding Counts 7–9, Respondent contends that again Complainant’s “exhibits omit the actual text of the allegedly ‘confidential’ [September 28, 2020], email forwarded by Respondent to Mayor Warren, Councilperson Wooten, and [Counsel] White, despite the fact that Complainant indisputably possesses the text of the original email, as he is listed as the author of same.” As above, “[i]n the absence of the substantive contents of the referenced email, Complainant is unable to demonstrate that Respondent took [B]oard action unrelated to his

duties, took private action with the potential to compromise the [B]oard, or disclosed confidential information.”

Therefore, Respondent argues that “Complainant’s failure to submit the factual evidence” required by the Commission’s regulations is fatal to his claims and the alleged violations of *N.J.S.A.* 18A:12-24.1(c), *N.J.S.A.* 18A:12-24.1(e), and *N.J.S.A.* 18A:12-24.1(g).

Respondent also argues, “to the extent Complainant makes assertions ... regarding alleged OPRA violations by the Board, Superintendent, Business Administrator, or Custodian of Records, improper determinations allegedly made by the Board Attorney, or improper actions/statements allegedly made by Mayor Warren, Councilperson Wooten, or others, it is respectfully submitted that none of those individuals or entities are parties to this action, and that any such allegations are outside the scope, authority, and jurisdiction of the” Commission.

Finally, Respondent contends that the Complaint is **frivolous** because Complainant admits that he is “fully aware” of the 180-day limitations period, “yet he chose to abuse the process by filing untimely claims.” Furthermore, Complainant made a “deliberate choice to omit the substantive content of the allegedly ‘confidential’ emails forming the basis for his assertions, rendering it impossible for the Commission to determine whether there has been a violation.” Additionally, as a former Board President, Complainant “certainly knew, or should have known, that a complaint” should contain “specific types of ‘factual evidence,’” and that the Commission “is not the appropriate forum for the airing of his longstanding personal grievances with Mayor Warren and, by extension, Respondent” Therefore, Respondent maintains the Complaint “is abusive of a system which was designed to address conduct in violation of the public trust, *not* personal disagreements.” As such, “dismissal and monetary sanctions are appropriate.”

For the foregoing reasons, Respondent “respectfully requests” that the Commission dismiss the Complaint and impose monetary sanctions on Complainant.

C. Response to Motion to Dismiss and Allegation of Frivolous Filing

In his response to the Motion to Dismiss and allegation of frivolous filing, Complainant argues that “... [Board counsel’s] own emails, following each incident and confirming the confidentiality of the forwarded emails by [] Respondent, was more than enough proof to find that Respondent committed [e]thics [v]iolations.” Complainant asserts, “it is clear that there is an attempt to misdirect the focus from Respondent’s own self-determined actions, and instead interject details that have no connection to Respondent’s actions whatsoever.” Complainant further asserts, “Respondent is responsible for his own behavior and decision not to properly carry out his duties, including maintaining confidentiality of [a]ttorney-[c]lient privileged correspondences and communications, thus putting the [D]istrict at risk.”

Complainant notes that, in June, he hired an attorney to assist with retrieving all of the emails related to his OPRA requests. According to Complainant, he and his attorney received correspondence from Board counsel stating that the “requested and unmodified (not truncated)” Board emails from August 2020, as well as the “[D]istrict’s email database backup have been destroyed by the [D]istrict.” In addition, Complainant notes a “full copy of the September 28, 2020[,] email was also not delivered to Complainant” and the attorney. Subsequently,

Complainant's attorney requested the Board provide "evidence of certification from the [S]tate to allow this destruction of public records." Complainant maintains, "As a reminder" he is in possession of the August 25, 2020 email (Exhibit H), which according to the Portable Document Format (PDF), indicates eight pages were generated, "but later truncated down to only three pages," and the September 28, 2020, email which indicates seven pages as part of the PDF, but "was truncated before being delivered to Complainant." Complainant asserts he was able to retrieve the August 23, 2020, through August 28, 2020, emails and sent them to Board counsel for redactions; however, to date, he has not received them back. Complainant further maintains that he submitted an OPRA request to Respondent's employer for emails that Respondent forwarded from his Board email to his workplace, and the results from that request confirmed Respondent forwarded confidential Board emails from his workplace email address to Mayor Warren, Councilperson Wooten, and Counsel White. Complainant requests that the Commission contact the Board "to conditionally waive confidentiality of these emails in question so that the [Commission] can properly adjudicate this matter."

As to Respondent's "Statement of Facts," Complainant has "no response" to statements 1 through 3. As to statement 4, which notes that Respondent is the cousin of the Mayor, Complainant states that is "revealing news" and "this recent revelation had no bearing as to the filing" of this Complaint.

Complainant reaffirms that, based on the content of the emails, Board counsel "deemed the text confidential and executed the redactions for Complainant to legally submit the email for review by the [Commission]. Complainant made this conscious decision not to provide [a]ttorney-[c]lient privileged communications to the [C]ommission," despite Respondent's choice to forward these confidential communications to parties other than the Board, the administration and/or Board counsel.

As to the alleged violation on August 25, 2020, Complainant reaffirms Board counsel confirmed "the forwarded emails were confidential," and the "legal invoice also references" Respondent's involvement in the emails. Complainant notes he "made the conscious choice [not to] provide an unredacted copy of the email which contained confidential information." Complainant further notes he intended to file the redacted copy; however, he was "never given a full copy of that email in question." Complainant requests that the Commission "relax the 180 day limitation due to limitations placed upon Complainant by the [District]."

Regarding the alleged violations on September 25, 2020, and September 28, 2020, Complainant contends that he did not know who the forwarding party of the email was until he received records responsive to his OPRA request. Complainant further contends when Councilperson Wooten "emailed the Board, her email included the full confidential text between [Board counsel], not the forwarding party's email header."

Complainant maintains he has met the burden of proof by providing emails that Board counsel confirmed were confidential, and "all three instances display facts that Respondent [] was the forwarding party." Complainant further argues, Board counsel's "facts and determinations have absolutely been established to meet the standards of finding in favor of violations having occurred for *N.J.S.A. 18A:12-24.1(c)*, *N.J.S.A. 18A:12-24.1(e)* and *N.J.S.A. 18A:12-24.1(g)*." Complainant asserts the Motion to Dismiss should be denied.

Regarding the allegation of untimeliness (other than as addressed above), and as to Respondent's claim that as Board President, Complainant "should have concluded on his own who the forwarding party of the emails were," Complainant avers this argument is "wanting and contradictory to what Respondent's [c]ounsel has been arguing all along." Complainant asserts that Respondent's counsel claims, "Complainant as Board President should have had super powers of deduction to conclude, without evidence, that Respondent [] might have been the forwarding party." As to the September 29, 2020, email from Councilperson Wooten, Complainant contends the original email was sent to the entire Board and, therefore, "there was a possibility of any of the nine board members, as well as district administrators, purposely or mistakenly forwarding the mentioned emails." Complainant further notes, "no person, including Respondent [], responded to the question of who sent the email." Therefore, Complainant maintains that an "investigation and determination of who might have forwarded confidential material could absolutely not be limited to recipients Council[person] Wooten listed in her email."

As to Respondent's "Claims of Extraneous Allegations," Complainant notes he "never stated that the SEC, nor any other party take action against any parties listed by Respondent's [c]ounsel, other than Respondent." Complainant further notes the allegations in this Complaint are not his opinion, "but are documented in the OPRA [r]equests, emails, and incomplete responsive records themselves."

Finally, regarding Respondent's frivolous allegation, Complainant asserts that Board counsel or the Custodian of Records made all redactions. Complainant believes it would have been a violation if he would have provided confidential correspondence without consent from the Board, and it was Board counsel who determined that the emails were confidential. Complainant notes he does not have a grievance with Mayor Warren and, as a public official "for twelve years," Mayor Warren "should have known that any emails sent to a public entity are subject to retrieval by the public via [an] OPRA [r]equest." Complainant reaffirms he was unaware of Respondent's familial connection to Mayor Warren when he filed his Complaint. Complainant requests that the Commission deny Respondent's Motion to Dismiss, find the Complaint not frivolous, find that Respondent violated the Act, and subject Respondent to penalty.

III. Analysis

A. Standard for Motion to Dismiss

In determining whether to grant a Motion to Dismiss, the Commission shall review the facts in the light most favorable to the non-moving party (Complainant), and determine whether the allegation(s), if true, could establish a violation of the Act. Unless the parties are otherwise notified, a Motion to Dismiss and any response is reviewed by the Commission on a summary basis. *N.J.A.C.* 6A:28-8.1 *et seq.* Thus, the question before the Commission is whether Complainant has alleged sufficient facts which, if true, could support a finding that Respondent violated *N.J.S.A.* 18A:12-24.1(c) (in Count 1, Count 4, and/or Count 7), violated *N.J.S.A.* 18A:12-24.1(e) (in Count 2, Count 5, and/or Count 8), and/or violated *N.J.S.A.* 18A:12-24.1(g) (in Count 3, Count 6, and/or Count 9).

B. Jurisdiction of the Commission

In reviewing the allegations in this matter, the Commission notes that its authority is limited to enforcing the Act, *N.J.S.A. 18A:12-21 et seq.*, a set of minimum ethical standards by which all school officials must abide. In this regard, the Commission has jurisdiction only over matters arising under the Act, and it may not receive, hear, or consider any matter that does not arise under the Act, *N.J.A.C. 6A:28-1.4(a)*.

With the jurisdiction of the Commission in mind, to the extent that Complainant seeks a determination from the Commission that Respondent or any other District administrator may have violated OPRA, or that another unnamed school official (or non-school official) may have engaged in wrongdoing unrelated to the Act, such determinations fall outside the scope, authority, and jurisdiction of the Commission. Nonetheless, and while Complainant may be able to pursue those claims in the appropriate tribunal, the Commission is not the appropriate entity to adjudicate such issues. As such, those claims are dismissed.

C. Alleged Untimeliness

As part of his Motion to Dismiss, Respondent also argues that the Complaint is **untimely** and, on that basis alone, should be dismissed. Per Respondent, one hundred eighty (180) days from August 25, 2020, September 25, 2020 and September 28, 2020, is February 21, 2021, March 24, 2021, and March 27, 2021, respectively, but the Complaint was not filed until April 1, 2021. Respondent argues Complainant's assertion that "he was unable to file on time because the Board allegedly did not adequately respond to his OPRA request for a copy of his own 'original' email"; is "ludicrous" because "(a) Complainant admitted possession of his 'original' email when he stated the [August 25, 2020], response that he received from Mayor Warren 'included the original [and allegedly] confidential email,'" and "(b) Complainant's 'original' email has, by definition, always been in Complainant's possession, as Complainant was the author of same." As to the September 25, 2020, and September 28, 2020, emails and Complainant's assertion that he first discovered these emails on January 23, 2021, and that Respondent was responsible for the forward, Respondent argues Complainant's assertions are "belied" by an Exhibit attached to the Complaint which indicated that, in the aftermath of the referenced emails, Councilperson Wooten sent a response to Board counsel on September 29, 2020, and copied several other individuals, including Complainant; therefore, Complainant was "indisputably aware of the existence of the referenced emails (and the fact that they were forwarded to Councilperson Wooten) no later than [September 29, 2020]."

Complainant counters that the Commission "relax the 180 day limitation due to limitations placed upon Complainant by the [District]," namely that the District failed to timely provide (or provide at all) complete records responsive to his OPRA requests; Complainant did not know who the forwarding party was of the September 25, 2020, and/or September 28, 2020, emails until he received records responsive to his OPRA request; as to the September 29, 2020, email from Councilperson Wooten, Complainant contends the original email was sent to the entire Board, and, therefore, "there was a possibility of any of the nine board members, as well as district administrators, purposely or mistakenly forwarding the mentioned emails"; and an "investigation and determination of who might have forwarded confidential material could absolutely not be limited to recipients Council[person] Wooten listed in her email."

The Commission's regulations provide a one hundred eighty (180) day limitation period for filing a complaint. More specifically, *N.J.A.C. 6A:28-6.5(a)* provides, in relevant part:

- (a) Complaints shall be filed within 180 days of notice *of the events which form the basis of the alleged violation(s)*. A complainant shall be deemed to be notified of events which form the basis of the alleged violation(s) *when he or she knew of such events or when such events were made public so that one using reasonable diligence would know or should have known* (emphasis added).

Pursuant to *N.J.A.C. 6A:28-6.5(a)*, the Commission must determine when Complainant knew of the events which form the basis of his Complaint, or when such events were made public so that one using reasonable diligence would know, or should have known, of such events. In this regard, a careful and thorough review of the record reveals the following events/facts regarding **Counts 1–3**:

- On August 25, 2020 (at 11:44 p.m.), Mayor Warren sent an email (subject “Re: Message from Ms. Kleen”) to Respondent (at both his Board and work email accounts), Complainant, the Superintendent (G. Fitzhugh), the then Board Vice President (B. Daughtry), Board counsel, and the then Business Administrator (A. James).
 - Mayor Warren’s email stated, in relevant part:

I have reviewed with disdain the scurrilous, baseless and nefarious claims of conflict that have been hurled by [Complainant] in his efforts to thwart a productive meeting between the executive branch of the City’s government and the all-important ... Board As a fiduciary, he wasted public money on a legal opinion that merely recited the same statement of law that was provided to [Complainant] and every other board of education member

- In an Invoice dated August 31, 2020, and for service on August 27, 2020, Board counsel billed the Board for, “Receipt, review and response to correspondence from [Complainant] regarding rectified unintentional email forwarded.”

With the above in mind, it is beyond dispute that Complainant was aware, on August 25, 2020, that a “confidential email” communication he authored and distributed “within the Board” was forwarded or provided to individuals outside the Board. Complainant first learned this when he, along with other members of the Board, Board counsel, and members of the administration received an email from Mayor Warren which directly addressed Complainant’s “confidential email.” Even if Complainant did not know who forwarded or provided his (Complainant’s) “confidential email” to those outside the Board, the Complaint specifically states, “After this incident, Respondent ... acknowledged that he did in fact forward the Board email to the outside party.” Although the date of Respondent’s admission is unclear, the record establishes that Complainant knew it was Respondent by no later than August 27, 2020, which is the date that he (Complainant) had a conversation with Board counsel about Respondent’s purported inadvertent or “unintentional” disclosure.

As such, and regardless of when Complainant submitted an OPRA request(s) and received, or did not receive, responsive records to his OPRA request(s), Complainant had notice of the events which form the basis for the alleged violations of the Code in Counts 1–3, in construing the facts in the light most favorable to Complainant, no later than August 27, 2020. With August 27, 2020, as the starting point for Complainant’s knowledge of all operative facts, Complainant had one hundred eighty (180) days therefrom, or until February 23, 2021, to file a Complaint concerning the assertions in Counts 1–3. Because Complainant did not file his Complaint until April 1, 2021, Counts 1–3 were **untimely filed**.

As for the relevant events/facts relative to **Counts 4–9**, a careful and thorough review of the record indicates:

- On September 18, 2020 (at 10:34 p.m.), Complainant sent an email (subject “Board Candidates at School Events”) to Board counsel, with a copy to the Superintendent (G. Fitzhugh), the then Board Vice President (B. Daughtry), and the then Business Administrator (A. James).
- On September 24, 2020 (at 10:31 p.m.), Councilperson Wooten seemingly sent a reply to Complainant’s September 18, 2020, email (subject “Re: Board Candidates at School Events”) to Board counsel (along with attached correspondence), and copied the Superintendent (G. Fitzhugh), the then Board Vice President (B. Daughtry), the then Business Administrator (A. James), **Respondent**, and **Complainant**.
- On September 25, 2020 (at 10:03 a.m.), Complainant sent an email (subject “RE: Board Candidates at School Events”) to Board counsel, with a copy to the Superintendent (G. Fitzhugh), the then Board Vice President (B. Daughtry), and the then Business Administrator (A. James).
- On September 25, 2020 (at 10:06 a.m.), Respondent – who was **not** a recipient of Complainant’s email – forwarded Complainant’s September 25, 2020, email (subject “RE: Board Candidates at School Events”) to Mayor Warren, Councilperson Wooten, and Counsel White.
- On September 28, 2020 (at 10:37 a.m.), Complainant sent an email (subject “RE: Board Candidates at School Events – Superintendent’s Response”) to Board counsel and another Board member (S. Johnson), with a copy to the then Board Vice President (B. Daughtry), the then Business Administrator (A. James), and the Superintendent (G. Fitzhugh).
- On September 28, 2020 (at 10:46 a.m.), Respondent – who was **not** a recipient of Complainant’s email – forwarded Complainant’s September 28, 2020, email (subject “RE: Board Candidates at School Events – Superintendent’s Response”) to Mayor Warren, Councilperson Wooten, and Counsel White, along with the statement, “[Complainant] response to [Board member] Johnson,” and then also separately forwarded the same email to his work email account.

- On September 28, 2020 (at 12:35 p.m.), Board counsel sent an email (no subject, nor recipient list provided), which stated, in pertinent part:

... Upon review of your email and the attachment, it is clear you were forwarded confidential communication. The email you reference was addressed to me, as the attorney for the Board, and sought legal advice regarding a specific set of facts. As such, that communication is privileged and should not have been shared with you. ...

- On September 29, 2020 (at 2:38 p.m.), Councilperson Wooten sent a reply to Board counsel's email (subject "Re: Board Candidates at School Events") to Board counsel (along with attached correspondence), with a copy to the Superintendent (G. Fitzhugh), the then Board Vice President (B. Daughtry), the then Business Administrator (A. James), **Respondent**, and **Complainant**.

With the above in mind, when Complainant received email communications from Councilperson Wooten that directly responded to an issue(s) from internal email communications that he (Complainant) had only sent to other Board members and members of the administration, and of which she (Councilperson Wooten) was not a recipient, Complainant knew that internal Board communication(s) had been sent to people outside of the Board. It was *then*, and not at the conclusion of his term as a Board member, that Complainant (the then Board President) should have made reasonable efforts to determine or investigate who, of the four (4) recipients of his (Complainant's) September 18, 2020, and September 25, 2020, emails (Board counsel, the Superintendent (G. Fitzhugh), the then Board Vice President (B. Daughtry), and the then Business Administrator (A. James)) had forwarded those emails to others within or outside the Board. Of critical importance, in both of her September 24, 2020, and September 29, 2020, email communications responding to internal Board communications/emails, Councilperson Wooten included all of the original email recipients, with only one "new" or "additional" recipient – **Respondent**. In light of his (Respondent's) August 2020 admission that he "inadvertently" transmitted an earlier email to others outside the Board, which included Councilperson Wooten, Complainant even had a lead on who may have ultimately been responsible for the "leak" to individuals outside the Board or, at the very least, reason to question why anyone, let alone Councilperson Wooten, would have included Respondent on communications that he was not initially copied on and, therefore, not intended to receive.

Consequently, and irrespective of when Complainant submitted an OPRA request(s) and received, or failed to receive, responsive records regarding his OPRA request(s), Complainant had notice of the events which form the basis for the purported violations of the Code in Counts 4–9, in construing the facts in the light most favorable to Complainant, no later than September 29, 2020. This date, September 29, 2020, is the date of the last email communication from Councilperson Wooten to multiple recipients, including Complainant, which directly addressed an issue(s) that emanated from Complainant, and was only sent to Board members and/or members of the administration. With September 29, 2020, as the starting point, Complainant had

until March 29, 2021,² to file a Complaint regarding the claims in Counts 4–9. In light of the fact that Complainant did not file his Complaint until April 1, 2021, Counts 4–9 were also **untimely filed**.

Accordingly, and constrained by the period of limitations that applies to the filing of complaints, the Commission has determined to **grant** the Motion to Dismiss because the Complaint was untimely filed.

Notwithstanding its decision to grant the Motion to Dismiss, the Commission finds that the transmission of internal Board communications, which appeared to be both deliberative and confidential, to individuals outside of the Board is disquieting. Although Complainant’s decision to wait until he was no longer a member of the Board to file his Complaint may have been questionable (but perhaps strategic), internal discussions should also be regarded as sacrosanct, and when the Board and the administration is faced with evidence that same was repeatedly breached, appropriate action should be taken to ensure it does not occur in the future.

IV. Request for Sanctions

At its meeting on July 27, 2021, the Commission considered Respondent’s request that the Commission find the Complaint frivolous, and impose sanctions pursuant to *N.J.S.A.* 18A:12-29(e). Despite Respondent’s argument, the Commission cannot find evidence that might show that Complainant filed the Complaint in bad faith or solely for the purpose of harassment, delay, or malicious injury. The Commission also does not have information to suggest that Complainant knew or should have known that the Complaint was without any reasonable basis in law or equity, or that it could not be supported by a good faith argument for an extension, modification or reversal of existing law. *N.J.A.C.* 6A:28-1.2. Therefore, at its meeting on August 24, 2021, the Commission voted to find the Complaint not frivolous, and to deny the request for sanctions.

V. Decision

Based on the foregoing, and in reviewing the facts in the light most favorable to the non-moving party (Complainant), the Commission voted to **grant** the Motion to Dismiss because the Complaint was untimely filed. The Commission also voted to find that the Complaint is not frivolous, and to deny Respondent’s request for sanctions.

Pursuant to *N.J.S.A.* 18A:12-29(b), the Commission hereby notifies Complainant and Respondent that, for the reasons set forth above, this matter is dismissed. This decision is a final decision of an administrative agency and, therefore, it is appealable only to the Superior Court-Appellate Division. *See, New Jersey Court Rule 2:2-3(a).*

² Technically, one hundred eighty (180) days after September 29, 2020, is Sunday, March 28, 2021. Pursuant to *N.J.A.C.* 6A:28-1.2, “...calculations ...do not include the last day of the period being computed unless such day falls on a Saturday, Sunday or holiday, in which case the last day shall be deemed the next business day immediately following.”

Robert W. Bender, Chairperson

Mailing Date: August 30, 2021

***Resolution Adopting Decision
in Connection with C08-21***

Whereas, at its meeting on July 27, 2021, the School Ethics Commission (Commission) considered the Complaint, the Motion to Dismiss in Lieu of Answer (Motion to Dismiss) and allegation of frivolous filing, and the response to the Motion to Dismiss and allegation of frivolous filing submitted in connection with the above-referenced matter; and

Whereas, at its meeting on July 27, 2021, the Commission discussed granting the Motion to Dismiss because the Complaint was untimely filed; and

Whereas, at its meeting on July 27, 2021, the Commission discussed finding the Complaint not frivolous, and denying Respondent's request for sanctions; and

Whereas, at its special meeting on August 30, 2021, the Commission reviewed and voted to approve the within decision as accurately memorializing its actions/findings from its meeting on July 27, 2021; and

Now Therefore Be It Resolved, that the Commission hereby adopts the decision and directs its staff to notify all parties to this action of its decision herein.

Robert W. Bender, Chairperson

I hereby certify that the Resolution was duly adopted by the School Ethics Commission at a special meeting on August 30, 2021.

Kathryn A. Whalen, Director
School Ethics Commission