



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

101 SOUTH BROAD STREET  
PO Box 819  
TRENTON, NJ 08625-0819

Toll Free: 866-850-0511  
Fax: 609-633-6337  
E-mail: [grc@dca.state.nj.us](mailto:grc@dca.state.nj.us)  
Web Address:  
[www.nj.gov/grc](http://www.nj.gov/grc)

VINCENT P. MALTESE, Chairman  
COMMISSIONER SUSAN BASS LEVIN  
COMMISSIONER LUCILLE DAVY  
ROBIN BERG TABAKIN  
DAVID FLEISHER  
CATHERINE STARGHILL Esq., Executive Director

**FINAL DECISION**

**June 27, 2007 Government Records Council Meeting**

Wilma Thomas  
Complainant

Complaint No. 2006-185

v.

Plainfield Board of Education  
Custodian of Record

At the June 27, 2007 public meeting, the Government Records Council ("Council") considered the June 20, 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 The Council, therefore, finds that this complaint is dismissed as the Complainant has voluntarily withdrawn this complaint in a letter to the GRC dated May 16, 2007.

This is the final administrative determination in this matter. Any further review should be pursued in the Appellate Division of the Superior Court of New Jersey within forty-five (45) days. Information about the appeals process can be obtained from the Appellate Division Clerk's Office, Hughes Justice Complex, 25 W. Market St., PO Box 006, Trenton, NJ 08625-0006. Proper service of submissions pursuant to any appeal is to be made to the Council in care of the Executive Director at the State of New Jersey Government Records Council, 101 South Broad Street, PO Box 819, Trenton, NJ 08625-0819.

Final Decision Rendered by the  
Government Records Council  
On the 27<sup>th</sup> Day of June 2007

Vincent Maltese, 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: July 5, 2007**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director  
June 27, 2007 Council Meeting**

**Wilma Thomas<sup>1</sup>  
Complainant**

**GRC Complaint No. 2006-185**

v.

**Plainfield Board of Education<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:** Asbestos management plan from 1997-present for Hubbard Middle School in Plainfield, New Jersey

**Request Made:** September 12, 2006

**Response Made:** None.

**Custodian:** Victor Demming

**GRC Complaint Filed:** October 12, 2006

**Background**

**December 14, 2006**

Government Records Council's ("Council") Interim Order. At its December 14, 2006 public meeting, the Council considered the December 7, 2006 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

- 1) The Custodian's failure to provide the Complainant with a written response to her request within the statutorily mandated seven (7) business days resulted in a "deemed" denial, thus violating N.J.S.A. 47:1A-5.g and N.J.S.A. 47:1A-5.i.
- 2) Pursuant to the Council's decision in Paff v. Bergen County Prosecutor's Office, GRC Complaint No. 2005-115, the Custodian should have obtained a written agreement from the Complainant extending the seven (7) business day time frame required under OPRA if the Custodian required additional time to produce the records responsive.
- 3) Based on the Custodian's certification wherein he acknowledges the receipt of the Complainant's OPRA request and his failure to respond to the Complainant for forty-five (45) business days, it is possible that the Custodian's actions were intentional and deliberate, with knowledge of their wrongfulness, and not merely

---

<sup>1</sup> No legal representation listed in the file.

<sup>2</sup> No legal representation listed in the file.

negligent, heedless or unintentional. As such, the case should be referred to the Office of Administrative Law for determination of a knowing and willful violation of OPRA under the totality of the circumstances.

**December 19, 2006**

Council's Interim Order distributed to the parties.

**January 26, 2007**

Complaint was forwarded to the Office of Administrative Law for a determination of a knowing and willful violation of OPRA under the totality of the circumstances.

**May 16, 2007**

Complainant's written withdrawal of this complaint.

**Analysis**

The Complainant voluntarily withdrew her complaint in a letter to the GRC dated May 16, 2007, therefore no analysis is needed.

**Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that this complaint should be dismissed as the Complainant has voluntarily withdrawn this complaint in a letter to the GRC dated May 16, 2007.

Prepared By:

Rebecca A. DeVoe  
Case Manager

Approved By:

Catherine Starghill, Esq.  
Executive Director

June 20, 2007



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

101 SOUTH BROAD STREET  
PO Box 819  
TRENTON, NJ 08625-0819

Toll Free: 866-850-0511  
Fax: 609-633-6337  
E-mail: [grc@dca.state.nj.us](mailto:grc@dca.state.nj.us)  
Web Address:  
[www.nj.gov/grc](http://www.nj.gov/grc)

VINCENT P. MALTESE, Chair  
COMMISSIONER SUSAN BASS LEVIN  
ACTING COMMISSIONER LUCILLE DAVY  
ROBIN BERG TABAKIN  
DAVID FLEISHER  
CATHERINE STARGHILL Esq., Executive Director

**INTERIM ORDER**

**December 14, 2006 Government Records Council Meeting**

Wilma Thomas  
Complainant

Complaint No. 2006-185

v.

Plainfield Board of Education  
Custodian of Record

At the December 14, 2006 public meeting, the Government Records Council (“Council”) considered the December 7, 2006 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

- 1) The Custodian’s failure to provide the Complainant with a written response to her request within the statutorily mandated seven (7) business days resulted in a “deemed” denial, thus violating N.J.S.A. 47:1A-5.g and N.J.S.A. 47:1A-5.i.
- 2) Pursuant to the Council’s decision in Paff v. Bergen County Prosecutor’s Office, GRC Complaint No. 2005-115, the Custodian should have obtained a written agreement from the Complainant extending the seven (7) business day time frame required under OPRA if the Custodian required additional time to produce the records responsive.
- 3) Based on the Custodian’s certification wherein he acknowledges the receipt of the Complainant’s OPRA request and his failure to respond to the Complainant for forty-five (45) business days, 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, the case should be referred to the Office of Administrative Law for determination of a knowing and willful violation of OPRA under the totality of the circumstances.

Interim Order Rendered by the  
Government Records Council  
On The 14<sup>th</sup> Day of December, 2006



Vincent P. Maltese, Chairman  
Government Records Council

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

Robin Berg Tabakin, Vice Chairman & Secretary  
Government Records Council

**Decision Distribution Date: December 19, 2006**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
December 14, 2006 Council Meeting**

**Wilma Thomas<sup>1</sup>  
Complainant**

**GRC Complaint No. 2006-185**

v.

**Plainfield Board of Education<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:** Asbestos management plan from 1997-present for Hubbard Middle School in Plainfield, New Jersey.

**Request Made:** September 12, 2006

**Response Made:** None.

**Custodian:** Victor Demming

**GRC Complaint Filed:** October 12, 2006

**Background**

**September 12, 2006**

Complainant's Open Public Records Act ("OPRA") request. The Complainant hand-delivers a request for the asbestos management plan from 1997-present for Hubbard Middle School in Plainfield, New Jersey. The secretary dates and stamps the OPRA request received and signs the form.

**September 13, 2006**

Same OPRA Request sent via Certified Mail. The Complainant sent the same OPRA request that was hand-delivered on September 12, 2006, via certified mail to the Plainfield Board of Education offices.

**September 28, 2006**

Same OPRA Request sent via Certified Mail. After receiving no response from the Custodian the Complainant again sent the OPRA request via certified mail to the Plainfield Board of Education offices. Enclosed with the request is a letter stating that this is the third time the same OPRA request has been submitted to the Plainfield Board of Education office.

**October 12, 2006**

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

---

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

<sup>2</sup> No legal representation listed.

- Certified mail receipt from September 13, 2006,
- Certified mail receipt from September 28, 2006,
- September 27, 2006 letter from Complainant to Custodian, and
- OPRA request date stamped received September 12, 2006 by secretary.

The Complainant asserts that she sent three (3) separate OPRA requests to the Plainfield Board of Education requesting the same records and that all three requests went unanswered. The Complainant hand-delivered the first request which was dated and stamped received and signed by the secretary on September 12, 2006. The Complainant declares that she also sent the OPRA request to the Plainfield Board of Education two times via certified mail. Both times the package was signed for and received. The Complainant received the records responsive on November 17, 2006, forty-five (45) business days after the Complainant's initial OPRA request was submitted to the Plainfield Board of Education office.

#### **October 20, 2006**

Offer of Mediation sent to both parties. Neither party agreed to mediate this complaint.

#### **October 30, 2006**

Request for Statement of Information ("SOI") sent to the Custodian. The SOI was also sent to the Custodian's secretary via e-mail. The secretary responds via e-mail that she received the request for the Statement of Information, printed the e-mail, and will make sure the Custodian receives it.

#### **November 8, 2006**

Letter from GRC to Custodian. The Custodian failed to respond to the GRC's request for the SOI. The Custodian is given an additional three (3) business days to complete and return the SOI by November 14, 2006.

#### **November 15, 2006**

Custodian's SOI submitted. One (1) day after the deadline set by the GRC for submission of the Statement of Information, the Custodian submits the SOI with no attachments. The Custodian certifies that the Complainant requested records on September 12, 2006 and that the records were never provided to the Complainant. The Custodian also asserts that the records responsive will be released to the Complainant as soon as they are gathered.

#### **November 16, 2006**

Letter from GRC to Custodian. The GRC asked to be notified when the Complainant receives the records responsive.

#### **November 17, 2006**

Letter from the Custodian to the GRC. The Custodian informs the GRC that the Complainant received the records responsive at 10:45 a.m. on November 17, 2006.

### **Analysis**



## Whether the Custodian unlawfully denied access to the asbestos management plan from 1997-present for Hubbard Middle School?

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.

Additionally, OPRA states that:

“[i]f the custodian is unable to comply with a request for access, the custodian shall indicate the specific basis therefor on the request form and promptly return it to the requestor. The custodian shall sign and date the form and provide the requestor with a copy therefor ...” N.J.S.A. 47:1A-5.g.

OPRA also provides that:

“[u]nless a shorter time period is otherwise provided by statute, regulation, or executive order, a custodian of a government record shall grant access ... or deny a request for access ... as soon as possible, but *not later than seven business days after receiving the request ...* In the event a custodian fails to respond within seven business days after receiving a request, *the failure to respond shall be deemed a denial of the request ...*” (Emphasis added.) N.J.S.A. 47:1A-5.i.

The Complainant asserts that she sent three (3) separate OPRA requests to the Plainfield Board of Education requesting the same records and that all three requests went unanswered. The Complainant hand-delivered the first request which was dated and stamped received and signed by the secretary on September 12, 2006. The Complainant declares that she also sent the OPRA request to the Plainfield Board of Education two times via certified mail. Both times the package was signed for and received. The Complainant asserts that it wasn't until forty-five (45) business days later that she was finally granted access to the records responsive.

The Custodian certifies that the Complainant requested records on September 12, 2006, and the records were not provided to the Complainant within the statutorily mandated seven (7) business days. The Custodian asserts that the Complainant was given the records responsive forty-five (45) business days after the Complainant's OPRA request was received by the Plainfield Board of Education.

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.

In this case, the Complainant asserts that she sent three separate OPRA requests for the same records to the Plainfield Board of Education, all of which went unanswered. OPRA mandates that a custodian must either grant or deny access to the requested records within seven (7) business days from receipt of said request. As prescribed under N.J.S.A. 47:1A-5.i., a custodian's failure to respond to a records request within the required seven (7) business days results in a "deemed" denial. Also, pursuant to N.J.S.A. 47:1A-5.g., if the Custodian is unable to fulfill the OPRA request the Custodian is required to promptly return the OPRA request form to the requestor with a written explanation as to why the records are unavailable. In this case the Custodian certifies that the Complainant's OPRA requests were received and went unanswered until forty-five (45) business days after the OPRA request was submitted to the Custodian.

Additionally, in Paff v. Bergen County Prosecutor's Office, GRC Complaint No. 2005-115 (March 2006), the Custodian knew he needed additional time in order to respond to the Complainant's request, but failed to obtain a written agreement from the Complainant extending the seven (7) business day time frame required under OPRA to respond. The Council held that the Custodian's failure to obtain a written agreement extending the seven (7) business day time period resulted in a "deemed" denial of the request. Similarly in this case, if the Custodian required additional time beyond the seven (7) business day time period required by OPRA in order to satisfy the Complainant's request, the Custodian should have obtained a written agreement from the Complainant in order to do so. In this case the Custodian did not obtain a written agreement extending the time in which he had to respond to the Complainant's OPRA request, therefore creating a "deemed" denial pursuant to the Council's decision in Paff.

**Whether the Custodian's actions rise to the level of a knowing and willful violation of the OPRA and unreasonable denial of access under the totality of the circumstances?**

OPRA states that:

"[a] public official, officer, employee or custodian who knowingly and willfully violates [OPRA], as amended and supplemented, and is found to have unreasonably denied access under the totality of the circumstances, shall be subject to a civil penalty..." N.J.S.A. 47:1A-11.a.

OPRA allows the Council to determine a knowing and willful violation of the law and unreasonable denial of access under the totality of the circumstances. Specifically, OPRA states:

“...[i]f the council determines, by a majority vote of its members, that a custodian has knowingly and willfully violated [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, the council may impose the penalties provided for in [OPRA]...” N.J.S.A. 47:1A-7.e.

In this case the Custodian certifies that the Complainant’s OPRA request was received and went unanswered for forty-five (45) business days.

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).

Based on the Custodian’s certification wherein he acknowledges the receipt of the Complainant’s OPRA request and his failure to respond to the Complainant for forty-five (45) business days, 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, the case should be referred to the Office of Administrative Law for determination of a knowing and willful violation of OPRA under the totality of the circumstances.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

- 1) The Custodian’s failure to provide the Complainant with a written response to her request within the statutorily mandated seven (7) business days resulted in a “deemed” denial, thus violating N.J.S.A. 47:1A-5.g and N.J.S.A. 47:1A-5.i.
- 2) Pursuant to the Council’s decision in Paff v. Bergen County Prosecutor’s Office, GRC Complaint No. 2005-115, the Custodian should have obtained a written agreement from the Complainant extending the seven (7) business day time frame required under OPRA if the Custodian required additional time to produce the records responsive.
- 3) Based on the Custodian’s certification wherein he acknowledges the receipt of the Complainant’s OPRA request and his failure to respond to the Complainant for forty-five (45) business days, 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, the case should be referred to the Office of Administrative Law for determination of a knowing and willful violation of OPRA under the totality of the circumstances

Prepared By:

Rebecca A. Steese  
Case Manager

Approved By:

Catherine Starghill, Esq.  
Executive Director

December 7, 2006