



## State of New Jersey

### GOVERNMENT RECORDS COUNCIL

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VINCENT P. MALTESE, Chairman  
ACTING COMMISSIONER JOSEPH V. DORIA, JR.  
COMMISSIONER LUCILLE DAVY  
ROBIN BERG TABAKIN  
DAVID FLEISHER  
CATHERINE STARGHILL Esq., Executive Director

### FINAL DECISION

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

Teri Quirk

Complaint No. 2007-187

Complainant

v.

Nutley Board of Education (Essex)

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 adopted the entirety of said findings and recommendations by a majority vote. The Council, therefore, finds that:

1. The Custodian’s failure to produce the “School Agreement” may have been inadvertent, but the Custodian is still required to make prompt and accurate response to a requestor. Therefore, the Custodian’s failure to produce the “School Agreement” record in response to the Complainant’s June 22, 2007 OPRA request results in a deemed denial of access to this record. N.J.S.A. 47:1A-5.i.
2. Because the Custodian’s failure to produce the “School Agreement” in response to the Complainant’s June 22, 2007 OPRA request that resulted in a deemed denial of access was an oversight, it is concluded that the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances. However, the Custodian’s unlawful denial of access appears negligent and heedless since he is vested with the legal responsibility of granting and denying access in accordance with the law.

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 31<sup>st</sup> Day of October, 2007

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  
Government Records Council

**Decision Distribution Date: November 16, 2007**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

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

**Teri Quirk<sup>1</sup>  
Complainant**

**GRC Complaint No. 2007-187**

v.

**Nutley Board of Education (Essex)<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:** Contract for Channel One between Nutley Board of Education and Channel One.

**Request Made:** June 22, 2007

**Response Made:** July 2, 2007

**Custodian:** Robert Green

**GRC Complaint Filed:** July 25, 2007

**Background**

**June 22, 2007**

Complainant's Open Public Records Act ("OPRA") request. The Complainant requests the record relevant to this complaint listed above on an official OPRA request form.

**July 2, 2007**

Custodian's Response to the OPRA request. The Custodian responds in writing to the Complainant's OPRA request on the sixth (6<sup>th</sup>) business day following receipt of such request. The Custodian provides "Terms and Conditions of Network Participation," which includes floor plans showing installation points in the school, as the record responsive to this request.

**July 25, 2007**

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

- Complainant's OPRA request dated June 22, 2007.
- Letter from the Custodian to the Complainant dated July 2, 2007.
- "Terms and Conditions of Network Participation" record provided to Complainant.

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

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

- “School Agreement” excluded from the records provided to the Complainant by the Custodian on July 2, 2007.

The Complainant states that she made an OPRA request on June 22, 2007. The Complainant states that she received the record responsive on July 2, 2007. The Complainant states that she received an additional record that was responsive to her request, entitled “School Agreement,” from another source a few weeks after the Complainant had been provided with what she thought were all records responsive from the Custodian. The Complainant states that the “School Agreement” was signed by the Custodian on January 31, 2007; therefore, the record had to be held by the Custodian.

The Complainant asserts that the Custodian’s exclusion of the “School Agreement” was a deliberate attempt to withhold information from the public. The Complainant asserts that this feeling was re-enforced when a separate requestor informed the Complainant that a copy of the blank “School Agreement” was provided in response to the requestor’s OPRA request submitted prior to the signing date. The Complainant requests that the GRC investigate the matter and inform the Custodian that it is his duty as a Custodian of Record to provide all records responsive when requested.

**August 24, 2007**

Offer of Mediation sent to both parties.

**August 29, 2007**

The Custodian agreed to mediate this complaint. The Complainant did not respond to the Offer of Mediation.

**September 10, 2007**

Request for the Statement of Information sent to the Custodian.

**September 12, 2007**

Custodian’s Statement of Information (“SOI”) with the following attachments:

- Complainant’s OPRA request dated June 22, 2007.
- Letter from the Custodian to the Complainant dated July 2, 2007.
- “Terms and Conditions of Network Participation” record provided to the Complainant.
- “School Agreement” excluded from the records provided to the Complainant by the Custodian.

The Custodian certifies that upon receipt of the Complainant’s June 22, 2007 OPRA request, the Custodian’s search included reaching into a folder in his desk labeled “Channel One” and pulling out a packet of eight (8) stapled pages entitled “Terms and Conditions of Network Participation.” The Custodian states that he provided the record to the Complainant on July 2, 2007.

The Custodian asserts that he was first notified of this Denial of Access Complaint by the Complainant at a public board meeting on July 23, 2007. The Custodian asserts that he immediately recognized the “School Agreement” upon seeing it

and had not realized that this record was not attached to the “Terms and Conditions of Network Participation” packet he had provided to the Complainant on July 2, 2007. The Custodian asserts that there had been no denial of access because the omission of the “School Agreement” was merely an oversight. The Custodian also asserts that had this mistake been brought to his attention, the Custodian would have rectified the situation immediately.

### Analysis

#### **Whether the Custodian unlawfully denied access to the requested record?**

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 further 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.

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 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. A custodian must also release all records responsive to an OPRA request “with certain exceptions.” N.J.S.A. 47:1A-1.

In this complaint, the Complainant asserts the Custodian's failure to provide the "School Agreement" in response to her June 22, 2007 OPRA request was a deliberate action to keep certain information from the public. The Custodian asserts that his failure to produce the "School Agreement" was a simple oversight and that situation could have been easily rectified had the Complainant brought it to his attention.

In Donato v. Township of Union, GRC Complaint No. 2005-182 (February 2007), the Council held that pursuant to Mag Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super 534 (March 2005), a custodian is obligated to search his or her files to find identifiable government records listed in a requestor's OPRA request. The Council cited that "[u]nder OPRA, agencies *are required to disclose only "identifiable" government records not otherwise exempt ...*" (Emphasis added.) *Id.* at 549.

In this complaint, the Custodian failed to disclose an identifiable government record when he provided some, but not all, of the records responsive which were not otherwise exempt from disclosure. The Custodian's failure to produce the "School Agreement" may have been inadvertent, but the Custodian is still required to make prompt and accurate responses to a requestor. Therefore, the Custodian's failure to produce the "School Agreement" record in response to the Complainant's June 22, 2007 OPRA request results in a deemed denial of access to this record.

**Whether the Custodian's failure to provide a record responsive to the request 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).

The evidence of record indicates that the Custodian's denial of access to the "School Agreement" was inadvertent. Because the Custodian's failure to produce the "School Agreement" in response to the Complainant's June 22, 2007 OPRA request was an oversight, although it resulted in a deemed denial of access, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances. However, the Custodian's unlawful denial of access appears negligent and heedless since he is vested with the legal responsibility of granting and denying access in accordance with the law.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. The Custodian's failure to produce the "School Agreement" may have been inadvertent, but the Custodian is still required to make prompt and accurate response to a requestor. Therefore, the Custodian's failure to produce the "School Agreement" record in response to the Complainant's June 22, 2007 OPRA request results in a deemed denial of access to this record. N.J.S.A 47:1A-5.i.
2. Because the Custodian's failure to produce the "School Agreement" in response to the Complainant's June 22, 2007 OPRA request that resulted in a deemed denial of access was an oversight, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances. However, the Custodian's unlawful denial of access appears negligent and heedless since he is vested with the legal responsibility of granting and denying access in accordance with the law.

Prepared By:

Frank F. Caruso  
Case Manager

Approved By:

Catherine Starghill, Esq.  
Executive Director

October 24, 2007