



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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FINAL DECISION

June 25, 2008 Government Records Council Meeting

Thomas Driscoll
Complainant

Complaint No. 2007-303

v.

School District of the Chathams (Morris)
Custodian of Record

At the June 25, 2008 public meeting, the Government Records Council (“Council”) considered the June 18, 2008 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 because the Custodian in this complaint responded in writing on the same day of receipt of the Complainant’s November 30, 2007 OPRA request stating that no records responsive exist, the Custodian has borne his burden of proving that this denial of access was authorized by law pursuant to N.J.S.A. 47:1A-6 and Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005). Further, the Custodian was under no obligation to provide the requested record to the Complainant following the Custodian’s response that no record existed pursuant to Donato v. Borough of Emerson, GRC Complaint No. 2005-125 (February 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 25th Day of June, 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, Secretary
Government Records Council

Decision Distribution Date: July 2, 2008

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
June 25, 2008 Council Meeting**

**Thomas Driscoll¹
Complainant**

GRC Complaint No. 2007-303

v.

**School District of the Chathams (Morris)²
Custodian of Records**

Records Relevant to Complaint: The proposal for Cougar Field, submitted to the Board of Education (“BOE”) earlier this month, which calls for the installation of four 80-foot-tall poles, each carrying a dozen lights.

Request Made: November 30, 2007

Response Made: November 30, 2007

Custodian: Ralph H. Goodwin

GRC Complaint Filed: December 6, 2007

Background

November 30, 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.

November 30, 2007

Custodian’s Response to the OPRA request. The Custodian responds in writing to the Complainant’s OPRA request on the same business day as receipt of such request. The Custodian states that access to the requested record is denied because no record responsive exists and indicates his response on the Complainant’s OPRA request form.

December 6, 2007

Denial of Access Complaint filed with the Government Records Council (“GRC”) attaching the Complainant’s OPRA request dated November 30, 2007 and the Custodian’s response noted thereon.

The Complainant states that he submitted an OPRA request on November 30, 2007. The Complainant states that the Custodian responded on the same day of the request advising the Complainant that no records responsive existed.

¹ No legal representation listed on record.

² Represented by Nicholas Celso III, Esq., of Schwartz, Simon, Edelstein, Celso & Kessler, LLC (Morristown, NJ).

The Complainant did not agree to mediate this complaint.

December 18, 2007

Request for the Statement of Information sent to the Custodian.

December 20, 2007

E-mail from the Custodian's Counsel to the GRC. The Custodian's Counsel states that the BOE will be closed for the holidays beginning December 21, 2007 and is requesting a reasonable extension of time to submit the Statement of Information until January 8, 2008.³

December 20, 2007

E-mail from GRC to the Custodian's Counsel. The GRC grants the Custodian an extension until January 8, 2008 to file the Statement of Information.

January 8, 2008

Custodian's Statement of Information ("SOI") attaching the Complainant's OPRA request dated November 30, 2007 and the Custodian's response noted thereon.

The Custodian certifies that at the time of the request, a search for the requested proposal was made in both the BOE records and archives.

The Custodian's Council avers that at the time of the Complainant's November 30, 2007 OPRA request, the BOE did not possess any written proposals regarding the lighting project at the athletic fields nor any records detailing any such proposal. The Custodian's Counsel further avers that the Custodian cannot be expected to produce records that do not exist. The Custodian's Counsel finally avers that, despite not being able to disclose the requested record at the time of the Complainant's OPRA request, the Custodian did subsequently provide a proposal to light the Cougar athletic fields after it was obtained by the BOE.

Analysis

Whether the Custodian unlawfully denied access to the requested proposal?

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.

³ The Custodian's Counsel requests an extensive amount of time because the Custodian must prepare Statements of Information for four (4) Denial of Access complaints filed by the Complainant. Those three (3) other complaints are being adjudicated separately as Driscoll v. School District of the Chathams (Morris), GRC Complaint No. 2007-300, Driscoll v. School District of the Chathams (Morris), GRC Complaint No. 2007-301 and Driscoll v. School District of the Chathams (Morris), GRC Complaint No. 2007-302.

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 also provides 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 thereof ...” N.J.S.A. 47:1A-5.g.

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. N.J.S.A. 47:1A-1.1. A custodian must release all records responsive to an OPRA request “with certain exceptions.” N.J.S.A. 47:1A-1. Additionally, OPRA places the burden on a custodian to prove that a denial of access to records is lawful pursuant to N.J.S.A. 47:1A-6.

In this case, the Complainant states that the Custodian denied access to his November 30, 2007 OPRA request by advising the Complainant that no records responsive existed. The Custodian certifies in the SOI that the BOE did not possess the requested proposal at the time of the Complainant’s OPRA request and made note of this response on the Complainant’s request form. The Custodian further certifies that a proposal was provided to the Complainant once the BOE received the proposal. In Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July

2005), the GRC held that there was no unlawful denial of access to the requested record because the Custodian certified that no records responsive existed.

Therefore, because the Custodian in this complaint responded in writing on the same day of receipt of the Complainant's November 30, 2007 OPRA request stating that no records responsive exist, the Custodian has borne his burden of proving that this denial of access was authorized by law pursuant to N.J.S.A. 47:1A-6 and Pusterhofer, supra. Further, the Custodian was under no obligation to provide the requested record to the Complainant following the Custodian's response that no record existed pursuant to Donato v. Borough of Emerson, GRC Complaint No. 2005-125 (February 2007).

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that because the Custodian in this complaint responded in writing on the same day of receipt of the Complainant's November 30, 2007 OPRA request stating that no records responsive exist, the Custodian has borne his burden of proving that this denial of access was authorized by law pursuant to N.J.S.A. 47:1A-6 and Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005). Further, the Custodian was under no obligation to provide the requested record to the Complainant following the Custodian's response that no record existed pursuant to Donato v. Borough of Emerson, GRC Complaint No. 2005-125 (February 2007).

Prepared By:

Frank F. Caruso
Case Manager

Approved By:

Catherine Starghill, Esq.
Executive Director

June 18, 2008