



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

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

**FINAL DECISION**

**February 25, 2009 Government Records Council Meeting**

Joseph Krrywda  
Complainant

Complaint No. 2008-138

v.

Barnegat Township School District (Ocean)  
Custodian of Record

At the February 25, 2009 public meeting, the Government Records Council (“Council”) considered the February 18, 2009 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 Mr. Germano failed to forward the Complainant’s June 20, 2008 OPRA request to the Custodian or direct the Complainant to submit an OPRA request with the Custodian within the statutorily mandated seven (7) business days required, Mr. Germano has violated N.J.S.A. 47:1A-5.h. and N.J.S.A. 47:1A-5.i. See Kossup v. City of Newark Police Department, GRC Complaint No. 2006-174 (February 2007)(holding that Lt. Caroline Clark violated OPRA by failing to forward the request or direct the requestor to the proper Custodian of record pursuant to N.J.S.A. 47:1A-5.h.).
2. The Custodian has borne his burden of proving a lawful denial of access pursuant to N.J.S.A. 47:1A-6 and Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005) because the Custodian certified that no records responsive exist.
3. Even though Mr. Germano failed to forward the Complainant’s June 20, 2008 OPRA request to the Custodian or direct the Complainant to the proper Custodian within the statutorily mandated seven (7) business day time frame required under OPRA, Mr. Germano did forward the request to the Custodian approximately fourteen (14) business days following receipt of the Complainant’s request. Therefore, it is concluded that Mr. Germano’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, Mr. Germano’s “deemed” denial and failure to forward part of the



request to the proper Custodian appears negligent and heedless since he is vested with the legal responsibility of forwarding the Complainant's OPRA request to the proper Custodian or returning the OPRA request to the Complainant and directing the Complainant to the proper Custodian.

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 25<sup>th</sup> Day of February, 2009

Robin Berg Tabakin, Chair  
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: March 9, 2009**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
February 25, 2009 Council Meeting**

**Joseph Krzywda<sup>1</sup>  
Complainant**

**GRC Complaint No. 2008-138**

**v.**

**Barnegat Township School District (Ocean)<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:**

1. Resume and credentials for the head coach of Summer Sports Camp basketball for the year 2008.
2. Resume and credentials for the assistant coach of Summer Sports Camp basketball for the year 2008.
3. Resume and credentials for the head coach of Summer Sports Camp track and field for the year 2008.
4. Resume and credentials for the assistant coach of Summer Sports Camp track and field for the year 2008.
5. Resume and credentials for the head coach of Summer Sports Camp soccer for the year 2008.
6. Resume and credentials for the assistant coach of Summer Sports Camp soccer for the year 2008.
7. Resume and credentials for the head coach of Summer Sports Camp volleyball for the year 2008.
8. Resume and credentials for the assistant coach of Summer Sports Camp volleyball for the year 2008.
9. Resume and credentials for the head coach of Summer Sports Camp baseball for the year 2008.
10. Resume and credentials for the assistant coach of Summer Sports Camp baseball for the year 2008.

**Request Made:** June 20, 2008

**Response Made:** None

**Custodian:** Brian S. Falkowski

**GRC Complaint Filed:** July 7, 2008<sup>3</sup>

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

<sup>2</sup> Represented by Adam Silverman, Esq., of Montenegro, Thompson, Montenegro & Genz, P.C. (Brick, NJ).

<sup>3</sup> The GRC received the Denial of Access Complaint on said date.

## **Background**

### **June 20, 2008**

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.<sup>4</sup>

### **July 7, 2008**

Denial of Access Complaint filed with the Government Records Council ("GRC") attaching the Complainant's OPRA request dated June 20, 2008.

The Complainant states that he sent an OPRA request to John J. Germano ("Mr. Germano"), Athletic Director of Barnegat High School via facsimile on June 20, 2008. The Complainant states that he re-sent the OPRA request to Mr. Germano via certified mail on June 23, 2008 and received confirmation of delivery on June 24, 2008. The Complainant states that he tried to reach Mr. Germano via telephone and facsimile on July 3, 2008 to inquire about the status of this request.<sup>5</sup>

The Complainant contends that Mr. Germano failed to respond to his June 20, 2008 OPRA request within the statutorily mandated time frame afforded under OPRA. The Complainant asserts that Mr. Germano knowingly and willfully violated OPRA.

The Complainant did not agree to mediate this complaint.

### **July 21, 2008**

Request for the Statement of Information sent to the Custodian.

### **July 28, 2008**

Custodian's Statement of Information ("SOI") with no attachments.

The Custodian states that he did not receive the Complainant's June 20, 2008 OPRA request from Mr. Germano until July 14, 2008. The Custodian states that he then forwarded the request to Counsel for a legal opinion, which was received on July 16, 2008.

The Custodian certifies that because the individuals hired for the programs were not hired based on formal resumes and that no professional credentials were needed to coach in the Summer Sports Camp program, no records responsive exist. The Custodian contends that he was not provided sufficient time to respond because the Complainant had already filed a Denial of Access Complaint with the GRC on July 7, 2008, five (5) business days prior to receipt of the request by the Custodian.

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<sup>4</sup> The Complainant faxed this request to John J. Germano, Athletic Director of Barnegat High School on June 20, 2008.

<sup>5</sup> The Complainant includes a fax confirmation sheet dated June 20, 2008, a U.S. Postal Service confirmation of receipt of the request dated June 24, 2008 and another fax confirmation sheet dated July 3, 2008.

## Analysis

### **Whether the Custodian unlawfully denied access to the requested 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 provides that:

“[a]ny officer or employee of a public agency who *receives a request* for access to a government record *shall forward* the request to the custodian of the record or *direct* the requestor to the *custodian of the record.*” (Emphasis added.) N.J.S.A. 47:1A-5.h.

OPRA also states 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 he submitted an OPRA request to Mr. Germano on June 20, 2008 via facsimile and received no response. Conversely, the Custodian certifies that Mr. Germano did not forward the request to the Custodian until July 14, 2008.

OPRA requires “[a]ny officer or employee of a public agency who *receives a request* for access to a government record *shall forward* the request to the custodian of the record or *direct* the requestor to the *custodian of the record*.” (Emphasis added.) N.J.S.A. 47:1A-5.h. Therefore, because Mr. Germano failed to forward the Complainant’s June 20, 2008 OPRA request to the Custodian or direct the Complainant to submit the OPRA request directly to the Custodian within the statutorily mandated seven (7) business days required, Mr. Germano has violated N.J.S.A. 47:1A-5.h. and N.J.S.A. 47:1A-5.i. See Kossup v. City of Newark Police Department, GRC Complaint No. 2006-174 (February 2007)(holding that Lt. Caroline Clark violated OPRA by failing to forward the request or direct the requestor to the proper Custodian of record pursuant to N.J.S.A. 47:1A-5.h.).

Additionally, the Custodian certifies that because no resumes or professional credentials were needed to coach in the Summer Sports Camp program, no records responsive to the Complainant’s June 20, 2008 OPRA request exist.

In Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005), the Custodian failed to respond in a timely manner but did certify that no records responsive existed to the Complainant’s request. The GRC held that even though the Custodian violated N.J.S.A. 47:1A-5.i. by not responding in a timely manner, there was no unlawful denial of access because the requested records did not exist.

In the instant complaint, the Custodian was not given an adequate opportunity to respond to the Complainant’s June 20, 2008 OPRA request, as a Denial of Access Complaint had already been filed with the GRC when the Custodian received the request. However, similar to Pusterhofer, *supra*, the Custodian certified that no records responsive exist because no resumes or credentials were needed to coach in the Summer Sports Camp program. Therefore, the Custodian has borne his burden of proving a lawful denial of access pursuant to N.J.S.A. 47:1A-6 and Pusterhofer, *supra*, because the Custodian certified that no records responsive exist.

**Whether Mr. Germano’s failure to forward the Complainant’s request to the Custodian within the statutorily mandated time frame 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).

Even though Mr. Germano failed to forward the Complainant’s June 20, 2008 OPRA request to the Custodian or direct the Complainant to the proper Custodian within the statutorily mandated seven (7) business day time frame required under OPRA, Mr. Germano did forward the request to the Custodian approximately fourteen (14) business days following receipt of the Complainant’s request. Therefore, it is concluded that Mr. Germano’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, Mr. Germano’s deemed denial and failure to forward part of the request to the proper custodian appears negligent and heedless since he is vested with the legal responsibility of forwarding the Complainant’s OPRA request to the proper Custodian or returning the OPRA request to the Complainant and directing the Complainant to the proper Custodian.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. Because Mr. Germano failed to forward the Complainant’s June 20, 2008 OPRA request to the Custodian or direct the Complainant to submit an OPRA request with the Custodian within the statutorily mandated seven (7) business days required, Mr. Germano has violated N.J.S.A. 47:1A-5.h. and N.J.S.A. 47:1A-5.i. See Kossup v. City of Newark Police Department, GRC Complaint No. 2006-174 (February 2007)(holding that Lt. Caroline Clark violated OPRA

by failing to forward the request or direct the requestor to the proper Custodian of record pursuant to N.J.S.A. 47:1A-5.h.).

2. The Custodian has borne his burden of proving a lawful denial of access pursuant to N.J.S.A. 47:1A-6 and Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005) because the Custodian certified that no records responsive exist.
3. Even though Mr. Germano failed to forward the Complainant's June 20, 2008 OPRA request to the Custodian or direct the Complainant to the proper Custodian within the statutorily mandated seven (7) business day time frame required under OPRA, Mr. Germano did forward the request to the Custodian approximately fourteen (14) business days following receipt of the Complainant's request. Therefore, it is concluded that Mr. Germano'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, Mr. Germano's "deemed" denial and failure to forward part of the request to the proper Custodian appears negligent and heedless since he is vested with the legal responsibility of forwarding the Complainant's OPRA request to the proper Custodian or returning the OPRA request to the Complainant and directing the Complainant to the proper Custodian.

Prepared By: Frank F. Caruso  
Case Manager

Approved By: Catherine Starghill, Esq.  
Executive Director

February 18, 2009