State of New Jersey
GOVERNMENT RECORDS COUNCIL
101 SOUTH BROAD STREET
PO BOX 819
TRENTON, NJ 08625-0819

JON S. CORZINE
Governor

CHARLES A. RICHMAN
Acting Commissioner

FINAL DECISION

November 18, 2009 Government Records Council Meeting

John Paff
Complainant
v.
High Bridge Board of Education (Hunterdon)
Custodian of Record

Complaint No. 2008-218

At the November 18, 2009 public meeting, the Government Records Council ("Council") considered the November 10, 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 because of the generic definition of the word "present," and because the Board of Education's OPRA request form does not contain any additional language that restricts OPRA request submissions to hand-delivery only, as well as because custodians may restrict OPRA request submissions to the agency's normal business hours pursuant to N.J.S.A. 47:1A-5.a., the Board of Education's OPRA request form which was in use at the time of the Complainant's request does not provide misinformation regarding the accessibility of government records as the Council held in O'Shea v. Township of West Milford (Passaic), GRC Complaint No. 2007-237 (December 2008). As such, the Custodian has not violated OPRA.

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 18th Day of November, 2009

Robin Berg Tabakin, Chair
Government Records Council

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

Harlynne A. Lack, Secretary
Government Records Council

Decision Distribution Date: November 24, 2009

STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL

Findings and Recommendations of the Executive Director
November 18, 2009 Council Meeting

John Paff[1] **GRC Complaint No. 2008-218**
Complainant

v.

High Bridge Board of Education (Hunterdon)[2]
Custodian of Records

Records Relevant to Complaint: None.

Request Made: September 26, 2008
Response Made: Not relevant
Custodian: Anthony Juskiewicz
GRC Complaint Filed: September 26, 2008[3]

Background

September 26, 2008

Complainant's Open Public Records Act ("OPRA") request. The Complainant submits his OPRA request on an official OPRA request form.[4]

September 26, 2008

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

- Complainant's OPRA request dated September 26, 2008
- Excerpt from O'Shea v. Township of West Milford (Passaic), GRC Complaint No. 2007-237 (December 2008)
- Monroe Township Board of Education's OPRA request form
- Sayreville Board of Education's OPRA request form
- Township of Ocean Board of Education's OPRA request form

[1] No legal representation listed on record.
[2] Represented by Nicholas Celso, Esq., of Schwartz Simon Edelstein Celso & Zitomer, LLC (Morristown, NJ).
[3] The GRC received the Denial of Access Complaint on said date.
[4] The Custodian's response to the Complainant's OPRA request is not relevant to the adjudication of this complaint.

The Complainant asserts that similar to the issue in O'Shea v. Township of West Milford (Passaic), GRC Complaint No. 2007-237 (December 2008), the High Bridge Board of Education's ("BOE") OPRA request form provides misinformation regarding the accessibility of government records and as such, requestors may be deterred from submitting an OPRA request. Specifically, the Complainant states that the BOE's OPRA request form states that "this form must be completed and presented to the Office of the Board Secretary between the hours of 8 a.m. and 4 p.m., Monday – Friday when offices are normally open." The Complainant contends that said statement strongly suggests that requestors must hand deliver their record requests to the Board Secretary's office during regular business hours and that requests transmitted in another fashion will not be honored.

The Complainant states that pursuant to N.J.S.A. 47:1A-5.g., "a request for access to a government record shall be in writing and *hand-delivered, mailed, transmitted electronically, or otherwise conveyed* to the appropriate custodian" (emphasis added). The Complainant contends that the language on the BOE's form is misleading and may dissuade citizens from submitting OPRA requests.

Additionally, the Complainant states that other school districts across the State utilize similar language. Because this is not an isolated incident, the Complainant states that he does not wish to mediate this complaint. Rather, the Complainant seeks a ruling from the GRC. Specifically, the Complainant seeks a declaration from the GRC that the language on the BOE's OPRA request form "provides misinformation regarding the accessibility of said records, in essence, denying the requestor access to the records." Additionally, the Complainant seeks an order from the GRC compelling the BOE to amend its request form so that it is in compliance with OPRA.

October 4, 2008

E-mail from Complainant to GRC. The Complainant states that he received an e-mail from the Custodian dated October 3, 2008 in which the Custodian indicated that the BOE amended its OPRA request form. The Complainant states that the BOE's new OPRA request form is posted on its website. The Complainant contends that the BOE will likely assert that this Denial of Access Complaint is now moot since the BOE already amended the form at issue. The Complainant requests that the Council rule on the merits of this complaint, specifically whether the language contained on the BOE's OPRA request form at the time of the OPRA request violated OPRA, to help establish uniformity across the State. Additionally, the Complainant states that in New Jersey Division of Youth and Family Services v. J.B., 120 N.J. 112, 118-19 (1990), the court indicated that some courts are generally reluctant to decide issues that have become academic during the pendency of a case, although sometimes courts will make an exception when an issue presented is one of public interest, capable of repetition, yet susceptible to continuously evading judicial review. The Complainant asks the GRC to consider the issue in this present complaint within the category discussed above.

October 8, 2008

Request for the Statement of Information ("SOI") sent to the Custodian.

October 14, 2008

Custodian's SOI with the following attachments:

- Complainant's OPRA request dated September 25, 2008
- Fax confirmation page dated September 26, 2008[5]
- Copy of BOE's OPRA request form in use at the time of the Complainant's request
- Copy of BOE's current OPRA request form

The Custodian states that the Complainant called the BOE on September 25, 2008 and spoke to Secretary AnnMarie Byrne and requested a copy of the BOE's OPRA request form. The Custodian states that as he was out of the office that day, Ms. Byrne informed the Complainant that she would have to check with the Custodian before satisfying the Complainant's request. The Custodian states that Ms. Byrne was not familiar with the OPRA request form and thus hesitated on sending the Complainant the form on September 25, 2008. The Custodian certifies that he received the Complainant's OPRA request on the GRC's Model Request Form on September 26, 2008. The Custodian certifies that he faxed the Complainant a copy of the BOE's OPRA request form on September 26, 2008. The Custodian states that the Complainant called on said date and asserted that the OPRA request form was not ideal and should be located on the BOE's website. The Custodian certifies that he then adopted the GRC's Model Request Form as the BOE's official form and posted the form to the website on the following day.

September 17, 2009

Letter from the GRC to the Custodian. The GRC states that in the Complainant's Denial of Access Complaint, the Complainant included an OPRA request dated September 26, 2008 on the BOE's official OPRA request form. The GRC states that in the Custodian's SOI, the Custodian certified that he received an OPRA request from the Complainant on September 25, 2008 on the GRC's Model Request Form. The GRC asks the Custodian to provide a legal certification indicating whether he received the Complainant's OPRA request dated September 26, 2008 on the BOE's official OPRA request form at the time of the request.

September 23, 2009

Custodian's Certification. The Custodian certifies that he received the Complainant's OPRA request dated September 26, 2008 on the BOE's official OPRA request form on said date.

Analysis

Whether the BOE's OPRA request form violates OPRA?

OPRA states that:

[5] When the Custodian provided the Complainant with a copy of the BOE's OPRA request form.

"[t]he custodian of a government record shall permit the record to be inspected, examined, and copied by any person *during regular business hours*…" (Emphasis added). N.J.S.A. 47:1A-5.a.
OPRA provides that:

"[t]he custodian of a public agency shall adopt a form for the use of any person who requests access to a government record held or controlled by the public agency. The form shall provide space for the name, address, and phone number of the requestor and a brief description of the government record sought. The form shall include space for the custodian to indicate which record will be made available, when the record will be available, and the fees to be charged. The form shall also include the following:

(1) specific directions and procedures for requesting a record;
(2) a statement as to whether prepayment of fees or a deposit is required;
(3) the time period within which the public agency is required by [OPRA], to make the record available;
(4) a statement of the requestor's right to challenge a decision by the public agency to deny access and the procedure for filing an appeal;
(5) space for the custodian to list reasons if a request is denied in whole or in part
(6) space for the requestor to sign and date the form;
(7) space for the custodian to sign and date the form if the request is fulfilled or denied. N.J.S.A. 47:1A-5.f.

Additionally, OPRA mandates that:

"[a] request for access to a government record shall be in writing and hand-delivered, mailed, transmitted electronically, or otherwise conveyed to the appropriate custodian." N.J.S.A. 47:1A-5.g.

The Complainant states that pursuant to N.J.S.A. 47:1A-5.g. "a request for access to a government record shall be in writing and *hand-delivered, mailed, transmitted electronically, or otherwise conveyed* to the appropriate custodian" (emphasis added). The Complainant asserts that similar to the issue in O'Shea v. Township of West Milford (Passaic), GRC Complaint No. 2007-237 (December 2008), the BOE's OPRA request form provides misinformation regarding the accessibility of government records and as such, requestors may be deterred from submitting an OPRA request. Specifically, the Complainant states that the BOE's OPRA request form states that "this form must be completed and presented to the Office of the Board Secretary between the hours of 8 a.m. and 4 p.m., Monday – Friday when offices are normally open." The Complainant contends that said statement strongly suggests that requestors must hand deliver their record requests to the Board Secretary's office during regular business hours and that requests transmitted in another fashion will not be honored.

OPRA requires public agencies to adopt official OPRA request forms which must include specific information, such as specific directions and procedures for requesting a record. N.J.S.A. 47:1A-5.f. The BOE's OPRA request form that was in use at the time of the Complainant's OPRA request contained the following language regarding the procedure for requesting a government record: "[t]his form must be completed and presented to the Office of the Board Secretary between the hours of 8 a.m. and 4 p.m., Monday-Friday when offices are normally open."

The word "present" is defined as "to offer for observation, examination, or consideration."[6] Such definition does not specifically state that the presentation must be by hand-delivery. The definition does not speak to any specific method of presentation and thus is a general, neutral definition of the term. Additionally, the BOE's OPRA request form did not contain any additional statements that implied or specifically indicated that the BOE would not accept an OPRA request other than by hand-delivery.

Further, OPRA states that "the custodian of a government record shall permit the record to be inspected, examined, and copied by any person during regular business hours…" N.J.S.A. 47:1A-5.a. While this provision does not specifically address the times during which a requestor may present an OPRA request to a custodian, it is reasonable to make such a connection. In this instant complaint, the Custodian clearly articulated on the BOE's OPRA request form when regular business hours were scheduled for the convenience of the requestor.

Moreover, this instant complaint is distinguishable from O'Shea, *supra*. In said complaint, the Township's OPRA request form advised requestors that personnel records are exempt from disclosure pursuant to N.J.S.A. 47:1A-10, but failed to also inform requestors that there are exceptions to the personnel record exemption under OPRA. The Council held that "a requestor may be deterred from submitting an OPRA request for certain personnel records because the Township's form provides misinformation regarding the accessibility of said records, in essence, denying the requestor access to the records."

The Council's decision in O'Shea, *supra*, rested upon the Township's expressly written statement that personnel records were exempt from public access, which is only partially accurate. However, in this instant complaint, the BOE's OPRA request form does not contain any expressly written statements that contradict OPRA regarding how a requestor may submit an OPRA request. The statement contained on the form does not expressly allow or restrict request submissions by any particular method.

Therefore, because of the generic definition of the word "present," and because the BOE's OPRA request form does not contain any additional language that restricts OPRA request submissions to hand-delivery only, as well as because custodians may restrict OPRA request submissions to the agency's normal business hours pursuant to N.J.S.A. 47:1A-5.a., the BOE's OPRA request form which was in use at the time of the Complainant's request does not provide misinformation regarding the accessibility of

[6] present. (n.d.). *The American Heritage® Dictionary of the English Language, Fourth Edition.* Retrieved September 28, 2009, from Dictionary.com website: http://dictionary.reference.com/browse/present.

government records as the Council held in O'Shea, *supra.* As such, the Custodian has not violated OPRA.

However, the GRC commends the Custodian for amending its official request form to provide more clarity and consistency with the OPRA model request form.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that because of the generic definition of the word "present," and because the Board of Education's OPRA request form does not contain any additional language that restricts OPRA request submissions to hand-delivery only, as well as because custodians may restrict OPRA request submissions to the agency's normal business hours pursuant to N.J.S.A. 47:1A-5.a., the Board of Education's OPRA request form which was in use at the time of the Complainant's request does not provide misinformation regarding the accessibility of government records as the Council held in O'Shea v. Township of West Milford (Passaic), GRC Complaint No. 2007-237 (December 2008). As such, the Custodian has not violated OPRA.

Prepared By: Dara Lownie
Senior Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

November 10, 2009